United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

ORIGINAL

74-2326

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In the Matter of	In Proceedings for an Arrangement
D. H. OVERMYER CO., INC. (Alabama)	No. 73 B 1126
D. H. OVERMYER CO., INC. (Arizona)	No. 73 B 1127
D. H. OVERMYER CO., INC. OF OHIO	No. 73 B 1128
D. H. OVERMYER CO., INC. (Ohio)	No. 73 B 1129
D. H. OVERMYER CO., INC. (California)	No. 73 B 1130
D. H. OVERMYER CO., INC. (Colorado)	No. 73 B 1131
D. H. OVERMYER CO., INC. (Connecticut)	No. 73 B 1132
D. H. OVERMYER CO., INC. (Delaware)	No. 73 B 1133
D. H. OVERMYER CO., INC. (Florida)	No. 73 B 1134
D. H. OVERMYER CO., INC. (Georgia)	No. 73 B 1135
D. H. OVERMYER CO., INC. (Illinois)	No. 73 B 1136
D. H. OVERMYER CO., INC. (Indiana)	No. 73 B 1137
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D. H. OVERMYER CO., INC. (Pennsylvania)	No. 73 B 1155
D. H. OVERMYER CO., INC. (Rhode Island)	No. 73 B 1156
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D. H. OVERMYER CO., INC. (Utah)	No. 73 B 1159
D. H. OVERMYER CO., INC. (Virginia)	No. 73 B 1160

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

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DHORE COMPANY, INC.	No. 73 B 1189
OVERMODAL TERMINALS, INC.	No. 73 B 1175

Debtors-Appellants,

-and-

ROBERT P. HERZOG,

Receiver-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' APPENDIX VOLUME 1

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

In the Matter of :

D. H. OVERMYER CO., INC. (Alabama) :

et al. :

----------X

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

CASE NO. 73 B 1126-62, 75, 89

JUDGE WERKER

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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D. H. OVERMYER CO., INC. (Arizona)		73 B 1127
D. H. OVERMYER CO., INC. OF OHIO	:	73 B 1128
D. H. OVERMYER CO., INC. (Ohio)		73 B 1129
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D. H. OVERMYER CO., INC. (Colorado)		73 B 1131
D. H. OVERMYER CO., INC. (Connecticut)	:	73 B 1132
D. H. OVERMYER CO., INC. (Delaware)		73 B 1133
D. H. OVERMYER CO., INC. (Florida)	:	73 B 1134
D. H. OVERMYER CO., INC. (Georgia)		73 B 1135
D. H. OVERMYER CO., INC. (Illinois)	:	73 B 1136
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D. H. OVERMYER CO., INC. (Wisconsin)	:	73 B 1162
OVERMODAL TERMINALS, INC.		73 B 1175
DHORE COMPANY, INC.	:	73 B 1189
Debtors.	:	

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HENRY F. WERKER, D. J.

The Receiver and the Debtors in possession of the D. H. Overmyer Corporations (hereinafter collectively called "Overmyer") appeal to this Court from judgments and orders of the Honorable Roy Babitt, Bankruptcy Judge, made on August 6, 1974.[1] The

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[1] The Debtor is prosecuting this appeal with respect to 24 of the premises. The Receiver is not appealing the decisions in the following cases: Miami # 99; Pittsburgh # 4 & 5; Hartford # 2B; (footnote continued on next page)

Bankruptcy Judge ordered the termination of leases between Overmyer and the landlord-appellees and required Overmyer to surrender possession of leased premises to the landlords.

The organization and business activities of the Overmyer corporations are fully set forth in the opinion of the Bankruptcy Judge. For the purposes of this appeal it will only be necessary to describe them briefly.

Overmyer was in the business of long-term leasing of warehouse space from landlords and short-term subleasing of such space to subtenants.[2] Overmyer purchased parcels of land, arranged for financing and construction of warehouses on the properties, and then sold the warehouses to the landlords involved in this appeal under lease-back arrangements. The landlords were mainly investors content to play passive roles in the operation of the warehouses. Overmyer operated and maintained the premises, paid real estate and other taxes, and attempted to find subtenants in each case who would pay a higher rental than that which Overmyer owed to its landlord.

The leases between Overmyer and the landlords were prepared by Overmyer, and were long-term, usually over 30 years in

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(footnote # 1 continued from previous page)
San Francisco # 8; El Paso # 1; Columbus # 2; Columbus # 4; and Jackson # 2. (Throughout the proceedings below each case was identified by the geographic location of the warehouse involved.)

2 Overmyer also owned approximately 20 properties in fee.

...ration. Rentals were calculated to give the landlord a fixed return on his investment. In contrast, the leases between Overmyer and the subtenants were short-term with rentals in excess of the amount paid by Overmyer. Overmyer's profits were, in each case, keyed to its ability to find subtenants.

Over a period of years, relations between Overmyer and the landlords deteriorated. A number of factors contributed to the landlord's disenchantment with Overmyer including: late rental payments, and in some cases nonpayment of rent; failure to pay real estate and other taxes; allowing insurance to lapse; and failure to make needed repairs. As a result, several landlords began proceedings in state and federal courts to recover possession of their properties. Finally, on November 16, 1973, the parent corporation and approximately thirty-six of its subsidiaries filed petitions for arrangements under Chapter XI of the Bankruptcy Act, 11 U.S.C. §§ 701 et seq. (1970). A receiver was then appointed to operate the business of the debtor and its subsidiaries.

Since the leases between Overmyer and the landlords contained bankruptcy termination clauses, virtually every landlord began proceedings to recover his property. The Bankruptcy Judge, pursuant to his equitable powers, stayed these proceedings. After six months of testimony, he issued an opinion and orders awarding possession of the warehouse premises to the landlords, and upholding the validity of the termination clauses.

The appellants assert several arguments on this appeal. First, that the Bankruptcy Judge erred in refusing to exercise his equitable power to prevent the forfeiture of the Overmyer leases. Second, that it was error for the Bankruptcy Judge to include in his decision those cases in which the landlords did not rely on bankruptcy termination clauses to recover possession. And finally, that the Bankruptcy Judge failed to make appropriate findings of facts and conclusions of law.[3] I will discuss these arguments seriatim.

Section 70 (b) of the Bankruptcy Act, 11 U.S.C. § 110(b), reads in pertinent part:

---

[3] Overmyer also makes two other arguments. First, that the decision of the Bankruptcy Judge in the case known as Tampa # 3 was inconsistent with his decision in the cases on appeal. In Tampa # 3 the landlord's motion for possession was denied for the same reasons, according to Overmyer, that are present in these cases, namely: the profitability of the warehouse, the possible "windfall" to the landlord; and the rehabilitative purpose of Chapter XI. However, after reading the transcript of the Tampa # 3 case--with emphasis on the Bankruptcy Judge's statements on pages 44-52--the Court is satisfied that Tampa # 3 is distinguishable from the cases on appeal, particularly in view of the fact that there were no rent or other pre-petition defaults, or evidence of other inequitable conduct on the part of the debtor.

The final argument urged by Overmyer is that the Bankruptcy Judge prejudged the rights of the landlords before the trials. After reading the transcripts of all the cases on appeal, it is apparent that this argument by Overmyer has absolutely no merit.

> an express convenant [in a lease] that . . . the bankruptcy of a specified party thereto or of either party shall terminate the lease or give the other party an election to terminate the same shall be enforceable.

Overmyer in the first instance questions whether this section applies through section 302 of the Bankruptcy Act, 11 U.S.C. § 702, to a Chapter XI proceeding. This question, however, has been affirmatively answered in the Second Circuit. Queens Boulevard Wine & Liquor Corp. v. Blum, _____ F.2d _____ (June 11, 1974, Docket No. 73-1512, Slip Sheet Opinion at p. 4117). See also Speare v. Consolidated Assets Corp., 360 F.2d 882 (2d Cir. 1966); Geraghty v. Kiamie Fifth Avenue Corp., 210 F.2d 95 (2d Cir. 1954).

In addition appellants argue that even if section 70(b) is applicable to a Chapter XI proceeding, the Bankruptcy Judge has the power, in his equitable discretion, to prevent the termination of leases containing bankruptcy default provisions. It is not every corporate entity, however, that can be successfully rehabilitated under Chapter XI, and not every Chapter XI proceeding which requires such exercise of discretion. In re Webcor, Inc., 392 F.2d 893 (7th Cir.), cert. denied, 393 U.S. 837 (1968). See also SEC v. American Trailer Rentals Co., 379 U.S. 594, 618 (1965).

If the plan of arrangement is feasible and if it appears that there are compelling equitable and policy considerations for preventing forfeiture, then the bankruptcy default clauses may be deemed inconsistent with the rehabilitative nature of a reorganization proceeding. Queens Boulevard Wine & Liquor Co. v. Blum, supra, at 4120; Weaver v. Hutson, 459 F.2d 741 (4th Cir.), cert.

...d. 409 U.S. 957 (1972); In re Fleetwood Motel Corp., 335 F.2d 857 (3d Cir. 1964); Smith v. Hoboken R.R., 328 U.S. 123 (1946). While equity historically has been the forum in which forfeitures may be set aside, no one has suggested that when the equities appear to be evenly balanced or balanced on the side of the forfeiture the Court should grant such relief.

In the cases on appeal, the learned Bankruptcy Judge listened to the testimony of Overmyer and the Receiver as well as to that of the landlords in some forty cases. On the record it would appear that for a period of years prior to its filing under the Bankruptcy Act, Overmyer's conduct with respect to many of the landlords formed a pattern of consistent failure to meet its rent, repair, mortgage and tax obligations. Just prior to filing its Chapter XI petitions, Overmyer made promises with respect to remedying these defaults which could only have been made with an intention to deceive.[4] This modus operandi is not

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[4] An example of this type of conduct can be found in the Denver # 1 case. Overmyer had not paid rent to the landlord for the months of April, May, June and July of 1973. According to the landlord, Overmyer said he was in the process of arranging a loan, and that he would have the money by October 31, 1973. Transcript of hearings on Landlord's Motion For Possession, Denver # 1, March 7, 1974, at 14. The landlord agreed to accept Overmyer's personal notes for the unpaid rent. A few days before the notes were due, Overmyer told the landlord that his loan had not come through and that he would need until November 20th to make the payments. Id. at 17-18. On the 14th of November, the landlord called Overmyer and informed him that he would be coming to New York on November 19th to collect his money. At that time Overmyer
(footnote continued on next page)

new to the Courts. See D.H. Overmyer Co. v. Frick, 405 U.S. 174 (1972). The record is barren, on the other hand, of any conduct on the part of the landlords which could in any way be described as unfair, overreaching or vexatious.

Appellants cite several cases in which courts refused to order forfeitures.[5] However, as the Bankruptcy Judge noted, these cases all involved strong elements of public interest against forfeiture. In the cases on appeal, no strong public interest is present. The Overmyer corporations are not publicly owned, and no substantial public benefit would result from their continued existence. Indeed the only "public" interest in the Overmyer reorganization is that of its creditors, and nowhere has it been denied that the landlords represent the large majority of those creditors, both numerically and financially.

It is true, as appellants point out, that no public interest militated against forfeiture in Queens Boulevard, supra. But it is also true that in that case other equities existed on the side of the debtor which are not found in the cases at hand. In Queens Boulevard the debtor had defaulted on only one month's

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(footnote # 4 continued from previous page)
assured the landlord that he would make payment. Id. at 18. Finally, on the morning of the 19th, Overmyer told the landlord that the corporation had filed Chapter XI proceedings on Friday, November 16th. Id. at 19.

5 Weaver v. Hutson, supra; In re Fleetwood, supra; Smith v. Hoboken R.R., supra.

rent, the landlord had suffered no financial loss as he had a security deposit to rely on, tender was subsequently made by the debtor and lastly, the debtor had been successful in his Chapter XI proceeding, and had produced an arrangement that was on the verge of confirmation.

Here, on the other hand, defaults were repetitive, long-standing, and seriously impeded the financial position of the landlords.[6] Negotiation on the continuation of the leases was an impossibility, for the experience of the landlords with Overmyer negated further forebearance.

Overmyer also argues that if this Court affirms the decision of the Bankruptcy Judge, and the leases are terminated, the landlords will receive a "windfall." In view of the short-term nature of the subleases and the expenses involved in operating the warehouses, this so-called "windfall" is largely illusory and does not shift the balance of the equities.[7]

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[6] Testimony at several of the hearings showed that because of late rental payments by Overmyer, landlords often had to borrow money to make their mortgage payments. In a few cases, the warehouses were sold at tax sales, and had to be redeemed by the landlords. In most cases. Overmyer was obligated to make mortgage payments directly to the landlord's mortgagees. As with rental payments, these payments were frequently late.

[7] The record does not contain proof of the value of any "windfall." Both the receiver and the debtor append charts of projected profitability to their briefs. The projected profits are based on the assumption that the warehouses will be continuously occupied over the lifetimes of the leases. Economic prognostication is difficult enough in the short run. Such

(footnote continued on next page)

The plan of arrangement proposed by the receiver in these cases, unlike the one involved in Queens Boulevard, has been rejected by the debtors' creditor committees and found to be highly unrealistic by the Bankruptcy Judge. The proposed plan of arrangement splits the Overmyer creditors into two classes of general creditors. Class 1 consists of landlords whose leases have not been terminated. Each landlord would be paid 100% of the amount due him in cash upon confirmation of the arrangement "or such other amount as may be agreed upon between the respective landlord and respective debtor," receipt to cure any and all alleged defaults.

Class 2 creditors would consist of all other creditors including landlords already in possession of their respective properties. Under the plan they would be paid 1% of the amount

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difficulty is magnified when trying to predict the condition of events thirty or forty years into the future. In addition, the expenses in running the warehouses for each landlord may well be higher than those of Overmyer. The landlords will periodically have to renegotiate their leases or find new tenants in the marketplace. While some landlords will undoubtedly make increased profits upon repossession of the warehouses, it is pure speculation to say that all the landlords will receive a "windfall."

Overmyer also objects to the $20,000 per year allocation to each 120,000 sq. ft. warehouse for administration expenses. This figure was an approximation arrived at by the Court after listening to expert testimony and arguments of all parties. It should be noted that this figure was considered "light" by the Bankruptcy Judge and that when he asked for objections to his final approximation none were made. Transcript of Receiver As To The Over-All Overmyer Administration Cost Applicable To Each Property, April 18, 1974, at 85-89.

...d every two months. The plan also provides for the merger of all the debtor corporations into one, the elimination of all guarantees of the Overmyer subsidiaries' obligations and the creation of a sixty day grace period for all deferred payments. There is no explanation in the plan as to how these payments are to be financed.

Finally, it should be noted that the Queens Boulevard decision was an exception to the general rule of enforceability of bankruptcy forfeiture clauses.[8] As the Court there stated:

> Our decision does not deprive Section 70(b) of its statutory effect in those cases to which it is applicable. Bankruptcy forfeiture provisions are necessary for the protection of landlords and generally are enforceable. We hold only that, under the particular circumstances of this case, termination of Queens' lease would be grossly inequitable and contrary to the salutory purpose of Chapter XI. Slip Opinion at 4123.

Overmyer also argues that the Bankruptcy Judge failed to make specific findings of fact with respect to each individual case. In five of the cases landlords chose to rely on the rent default rather than the bankruptcy default clauses in their leases. Yet the same history of rent and tax defaults, failure to make repairs, and attempts to forestall dispossession marks these cases. In the Richmond 4 1 case the landlord acted under the rent default clause in his lease and terminated the lease with Overmyer well

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[8] Cases upholding forfeiture pursuant to termination clauses include: Fink v. Bateman, 325 U.S. 306 (1945); Schokbeton Industries, Inc. v. Schokbeton Products Corp., 466 F.2d 171 (5th Cir. 1972); Realty Co. v. Bonfiori, 326 F.2d 281 (2d Cir. 1963); Realty Co. v. Bottle-Fischer, 67 F.2d 7[illegible] (2d Cir.

before the Chapter XI petition was filed.

In another case (Camden # 2) the landlord sued for and won possession because of rent defaults in a summary proceeding in New Jersey. Thereafter, upon a stipulation and a consent judgment in the amount of $137,068.92, he permitted Overmyer to re-enter the premises upon condition that if the judgment were not paid by December 31, 1973 the lease agreement would terminate. The landlord was induced to enter into this stipulation on the specific assurance of the debtor that "there was no bankruptcy contemplated and as they viewed it, it would not violate [his] right to possession at the end of the year if they didn't pay it." Landlord's Motion For Possession (Camden # 2), April 11, 1974, at 14. The stipulation and judgment were signed on October 29, and filed November 9, 1973--only seven days before Overmyer began Chapter XI proceedings.

In a third case (St. Louis # 2 and # 3) the attorney for the receiver admitted on the record that the equities for the landlord were far stronger than they had been in the Queens Boulevard case. Overmyer's defaults in rent and taxes for the St. Louis property were substantial. The landlord sent notice of default in May and notice of termination in June, 1973. Yet when the landlord thereafter commenced an action for possession, Overmyer entered a general denial, clearly a sham answer meant only to create delay.

Likewise the history of Overmyer's unpaid taxes and failure to repair the Columbus # 3 property caused the landlord

to send notice of termination on August 22, 1973, three months before the filing of Chapter XI petitions. The facts in the Denver # 4 case are much the same. In that instance the landlord was required to redeem his property at a tax sale because of Overmyer's tax defaults. As a result he too served notice of termination well before the start of proceedings under the Bankruptcy Act. In addition to the above difficulties, which appear throughout the transcripts of the hearings on each property, some landlords were obliged to sell personal assets or borrow from third parties in order to pay the mortgages on the warehouse premises.

It is true that Overmyer's main assets are the subleases which it has arranged with subtenants in each of the premises affected. It is also true that the termination of the leases will deprive Overmyer of its business. Five of the leases, however, are now terminated, or subject to termination, not under the bankruptcy clause but because of a course of conduct pursued by Overmyer which was designed to try the patience of even the most long-suffering owner. That patience was understandably exhausted by the various events outlined above. This Court cannot see how in equity or in law those leases can now be resurrected.

The fact that the Bankruptcy Judge did not in each case make separate findings of fact was neither an abuse of discretion nor a clearly erroneous decision. The essential findings with respect to the leases terminated by the landlords before and after the filing of Chapter XI petitions are contained in Judge Babitt's

memorandum decision at pages 9, 10 and 11. These findings are sufficient under Bankruptcy Rule 752[9] for they afford a clear understanding of the grounds on which the Bankruptcy Judge based his decision. It was not necessary that he set forth specific findings with respect to each individual property. Woodmar Realty Co. v. Julius, 307 F.2d 591, 593 (7th Cir. 1962). See also In re Metropolitan Realty Corp.,[10] 433 F.2d 676, 679 (5th Cir.), cert. denied, 401 U.S. 1008 (1970).

This Court is convinced that there was no clear error by the Bankruptcy Judge with respect to the facts. It is equally persuaded that upon those findings the question which Judge Babitt was required to decide was one of law, i.e., whether upon the facts of this case and prior decisions in this Circuit he should exercise his discretion in equity to set aside the termination of the leases, whether terminated before the Chapter XI petitions or thereafter.

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9 This Rule is an adaption of Rule 52 of the Federal Rules of Civil Procedure.

10 The cases cited by the appellants, In re Gentile, 107 F. Supp. 476 (D. Ky. 1952); and In re Ulrico Development, 311 F. Supp. 1393 (D.P.R. 1970) are distinguishable. In Gentile, the referee declined to consider testimony offered by the Trustee as to certain financial books of the bankrupt. The district court concluded that the referee was not justified in declining to consider the testimony and remanded for a supplemental report. 107 F. Supp. at 476. In Ulrico, the district court judge had already made one remand to the referee with instructions that a transcript or summation of the evidence be made. The referee on remand simply affirmed that no transcript was

(footnote continued on next page)

His power to restrain repossession in the five cases where the lease had already been terminated prior to the filing of Chapter XI petitions was limited. As Judge Weinfeld stated in In re Lane Foods, Inc., 213 F. Supp. 133, 136 (S.D.N.Y. 1963):

> Since the debtor here was in possession, the Bankruptcy Court has the power to enjoin the threatened ouster for a reasonable period, if necessary, to effectuate the object of the Chapter XI proceeding. This, of course, does not mean that the debtor is entitled to remain in possession until the proceeding is consummated . . . .
>
> It is a common situation for a debtor to be in default in payment of rent under a lease, and for the landlord thereby to have the right to recover possession of the premises and to terminate the lease. The filing of a Chapter XI proceeding does not deprive the landlord of that right, although the court through its injunction powers may delay the enforcement of the landlord's remedy. 8. Collier, Bankruptcy, ¶ 3.15 n. 15 (14th ed. 1942).

The record in the five cases presented no evidence of fraud or overreaching which might call for resurrection of those leases, and consequently Judge Babitt's decision not to exercise his equitable power was clearly the correct one.

The evidence with respect to the other cases demonstrates a course of conduct on the part of Overmyer which warrants the exercise of discretion in the landlords rather than appellants'

(footnote # 10 continued from previous page)
made. There were no findings on which the court could make a decision. In the cases on this appeal, the Bankruptcy Judge's opinion and the record of the proceedings are more than adequate to enable this court to make its decision.

favor. This is especially so in light of the proposed plan of reorganization which simply cannot be characterized as feasible. It is the conclusion of this Court therefore that there was no abuse of discretion on the part of the Bankruptcy Judge in failing to exercise his discretion in favor of the appellants. It is also this Court's conclusion that Overmyer, because of the nature of its business operations,[11] and its failure to meet its several obligations, simply cannot be rehabilitated.

The conclusions of law of the Bankruptcy Judge are correct. His orders are in all respects affirmed.

Dated: New York, New York
September 27, 1974

U. S. D. J.

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[11] The Overmyer empire was a product of rapid expansion. As the Supreme Court noted in an earlier case involving Overmyer, that company had built "in three years . . . 180 warehouses in thirty states." D.H. Overmyer Co. v. Frick, 405 U.S. 174, 179 (1972).

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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In the Matter

of

In Arrangement Proceedings

73 B 1126-1162

OPINION

D. H. OVERMYER CO. INC., (Alabama)	No. 73 B 1126
D. H. OVERMYER CO. INC., (Arizona)	No. 73 B 1127
D. H. OVERMYER CO. INC., OF OHIO	No. 73 B 1128
D. H. OVERMYER CO. INC., (Ohio)	No. 73 B 1129
D. H. OVERMYER CO. INC., (California)	No. 73 B 1130
D. H. OVERMYER CO. INC., (Colorado)	No. 73 B 1131
D. H. OVERMYER CO. INC., (Connecticut)	No. 73 B 1132
D. H. OVERMYER CO. INC., (Delaware)	No. 73 B 1133
D. H. OVERMYER CO. INC., (Florida)	No. 73 B 1134
D. H. OVERMYER CO. INC., (Georgia)	No. 73 B 1135
D. H. OVERMYER CO. INC., (Illinois)	No. 73 B 1136
D. H. OVERMYER CO. INC., (Indiana)	No. 73 B 1137
D. H. OVERMYER CO. INC., (Kansas)	No. 73 B 1138
D. H. OVERMYER CO. INC., (Kentucky)	No. 73 B 1139
D. H. OVERMYER CO. INC., (Louisiana)	No. 73 B 1140
D. H. OVERMYER CO. INC., (Maryland)	No. 73 B 1141
D. H. OVERMYER CO. INC., (Michigan)	No. 73 B 1142
D. H. OVERMYER CO. INC., (Massachusetts)	No. 73 B 1143
D. H. OVERMYER CO. INC., (Minnesota)	No. 73 B 1144
D. H. OVERMYER CO. INC., (Mississippi)	No. 73 B 1145
D. H. OVERMYER CO. INC., (Missouri)	No. 73 B 1146
D. H. OVERMYER CO. INC., (Nebraska)	No. 73 B 1147
D. H. OVERMYER CO. INC., (Nevada)	No. 73 B 1148
D. H. OVERMYER CO. INC., (New Jersey)	No. 73 B 1149

D. H. OVERMYER CO. INC., (New Mexico)	No. 73 B 1150
D. H. OVERMYER CO. INC., (New York)	No. 73 B 1151
D. H. OVERMYER CO. INC., (North Carolina)	No. 73 B 1152
D. H. OVERMYER CO. INC., (Oklahoma)	No. 73 B 1153
D. H. OVERMYER CO. INC., (Oregon)	No. 73 B 1154
D. H. OVERMYER CO. INC., (Pennsylvania)	No. 73 B 1155
D. H. OVERMYER CO. INC., (Rhode Island)	No. 73 B 1156
D. H. OVERMYER CO. INC., (Tennessee)	No. 73 B 1157
D. H. OVERMYER CO. INC., (Texas)	No. 73 B 1158
D. H. OVERMYER CO. INC., (Utah)	No. 73 B 1159
D. H. OVERMYER CO. INC., (Virginia)	No. 73 B 1160
D. H. OVERMYER CO. INC., (Washington)	No. 73 B 1161
D. H. OVERMYER CO. INC., (Wisconsin)	No. 73 B 1162
OVERMODAL TERMINALS, INC.,	No. 73 B 1175
DHORE COMPANY, INC.,	No. 73 B 1189

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ROY BABITT, Bankruptcy Judge:

The parent debtor and forty of its subsidiaries each filed its own petition for an arrangement under the provisions of Chapter XI of the Bankruptcy Act, Sections 301 et. seq., 11 U.S.C. §§701 et. seq.[1] Shortly after the filing of these petitions, a receiver was appointed by a Judge of the District Court to operate the business of the debtor and those subsidiaries set forth in the above caption.[2]

At the onset, it is necessary to broadly structure the main business of these companies, which, for purposes of facility, will be considered as the business of the parent debtor.[3] The debtor is engaged in

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1 These were original petitions under Section 322, 11 U.S.C. §722, as no proceedings were pending when the jurisdiction of this court was invoked. Compare Section 321, 11 U.S.C. §721, which contemplates the filing of a petition for Chapter XI relief during the pendency of a bankruptcy.

2 Two of the petitions have been dismissed; some are not affected by this decision which covers disputes arising in twenty of the cases as will be seen.

3 The court uses the singular "debtor" to denote each of the debtors involved in these controversies since "the identity and individuality of the respective corporate entities are not relevant here..." D. H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972) at 179.

the business of long term leasing of warehouse space from landlords under lease-back arrangements and short term subleasing of such space to subtenants at rentals in excess of that payable by the debtor to its landlord under the lease-back. This business began when the debtor purchased parcels of land and arranged for the financing necessary for it in order to construct a warehouse on the land. In the finished structure, the debtor would lease space to others or operate a public warehousing enterprise for itself.[4] When the newly constructed warehouses had thus become viable, the land and buildings were sold to an investor subject, of course, to the outstanding encumbrances. Under the terms of the sale, the debtor would take back a lease from the purchaser in a typical lease-back situation, and the debtor would continue to operate the warehouses, collecting from the subtenants the rents called for by the leases between the debtor and the subtenants while the debtor would pay to the

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[4] The public warehouse aspect of the debtor's business was terminated shortly after the Chapter XI petitions were filed.

landlord-purchaser the amounts reserved by the sale and lease-back instruments. In the lease-backs the typical lease was a net-net lease whereby the landlord-purchaser was to receive fixed rent from the debtor during the life of the lease, the term of which was usually in the vicinity of thirty years including two option periods, but with a reduced rent to be paid by the debtor during those option periods. Under the net-net leases the debtor, as tenant, was obliged to maintain the property and usually to pay all real estate and other taxes as well as mortgage payments. It is noted here that while the lease between the debtor and the landlord-purchaser covered, with the options, a rather extensive period of time, the debtor's subleases with sub-tenants occupying the warehouse facilities were for short terms, and the total of the rents were in excess of the amount due the landlord-purchaser under the terms of the sale and lease-back to the debtor. This

complex and widespread warehousing enterprise was described to the Supreme Court as "having built 'in three years ... 130 warehouses in thirty states.'" D. H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972) at 179. Thus the business of the debtor, once it had terminated its own public warehouse operation, was basically that of landlord to subtenants, its profit in this operation being generated by the difference between the aggregate of the rents due under the subleases in a given warehouse and the amount for which the debtor was liable to the landlord-purchaser. It was expected, as the option terms disclose, that during the option periods the debtor would generate larger income from its subleases during a period when its own payment to the landlord-purchaser was reduced. On their part the landlord-purchasers received a substantial fixed income on their investments and whatever benefits the intricate tapestry of the internal revenue law might bestow on purchaser-lessors. There is evidence in the

record that by late 1973, the debtor's empire had been enhanced from the 180 warehouses noted by the Supreme Court to well over 200.

When the Chapter XI petitions were filed, virtually all of the debtors were in substantial arrears to these landlord-purchasers.[5] While the total amount of the arrearages has not been exactly ascertained, it is nowhere in dispute that the sum is well in excess of $12,000,000, and the landlord-purchasers represent the largest of the creditors, by far, with whom the debtor hopes to deal in these arrangement proceedings. At the time the petitions were filed the landlord-purchasers presented varying fact patterns in connection with what seems, from the record, to have been a continuing dialogue between them and their respective debtors concerning non-payment of rent or otherwise denominated amounts reserved under the lease-backs, nonpayment of taxes, default of mortgage payments, lapse of

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[5] The debtor also owned approximately twenty properties in fee. The payment due under many of the mortgages on such properties were in substantial arrears when these Chapter XI petitions came to this court.

insurance, non-repairs, etc. Some of the landlords had already been given possession in State Court proceedings. Some landlords had been given an assignment by the debtor of all rents due from the debtor's subtenants. For some properties, receivers had been appointed. Some landlords had begun proceedings in State Courts to regain their property but further proceedings to regain possession were stayed by this court.[6] Upon the filing of the petitions, this court entered orders staying the continuation or commencement of proceedings against the debtor affecting its property, it being clear that the leases between the debtor and the purchaser-landlord and the subleases between the debtor and the warehouse operators were assets of these estates and therefore subject to the court's protection.

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[6] The caption of this action sets forth the name of the parent and all its subsidiaries in various states in which warehouses are operated by the particular corporate debtor under lease-back arrangements. The separate corporations appear to have contemplated the operation of the debtor in a particular state so that, for example, the Minnesota company would refer to warehouses in Minnesota. Not all of these debtors are involved in the instant litigation. However, for convenience, the court captions this decision in keeping with the separate petitions filed by each of the companies operating under lease-back arrangements.

Within days of the filing of the petitions, virtually every landlord-purchaser began proceedings before this court either to recover its particular warehouse or to be permitted to proceed in other courts to recover such property. The litany was the same. The debtor was in substantial default in the payment called for by the net-net leases, that the properties were in need of repair for want of which the landlord's estates were being impaired, that mortgage foreclosures were threatened, that adverse tax action was being taken because of the debtor's default of the payment of taxes, that the landlords were obliged to make payments just to preserve the property, and that not only did the defaults by the debtor in making the payments constitute such default as to justify a conclusion that the leases had thereby terminated but the filing of the Chapter XI petitions by these debtors also constituted the happening of such event as to support the conclusion that the leases had terminated for that reason.

The response by the receiver, usually joined in by the debtor, was almost invariably

the same, and while the defenses ran the gamut from assertion of waiver of breach to inadequate notice of termination and estoppel, these were not seriously pressed. Rather, the main line of defense by the receiver and debtor was pitched to the proposition that to grant relief to the landlord-purchasers would amount to granting them a windfall contrary to the equitable jurisdiction of this court and, therefore, inimical to the Chapter XI proceedings themselves. The reasoning ran as follows: the debtor was not only the beneficiary now of monies from its subtenants in excess of that promised to the landlord-purchasers under the net-net leases, but the enhancement of those amounts during the option periods would be significant with the result that the landlord-purchasers should not be given the benefits of such abundance merely because the debtor was in substantial default and had invoked the jurisdiction of this bankruptcy court to achieve rehabilitation.

On their part, the landlord-purchasers press for recovery by insisting on their right to

enforcement of a right given by their contract with the debtor and that such right is not to be defeated by the filing of a Chapter XI petition. Moreover, they say that once given their right of enforcement of something bargained for and for which adequate consideration ran, this court's equity power to continue the debtor in possession of the subleases should, if available at all, not be exercised in view of the substantial prejudice which has already resulted.

In the continuing solicitude for a debtor in the Chapter XI process and mindful of a fair sampling of cases touching upon the court's equity power to obviate forefeiture, the court took testimony in each case concerning the profitability of the subleases between the debtor and its subtenants in light of the amounts of repairs generally allocable to keep a property useful, specific extraordinary repairs which might have to be made on certain properties and the charge to each property under the overall administration of the farflung warehouse empire run by the parent debtor including some of the receiver's costs, e.g., insurance coverage.

Those trials have been concluded during the six months or so that the receiver has been operating those warehouses which have not been abandoned to the landlords as a business decision by the receiver and the debtor or which were sold under the direction of the court and which resulted in some equity to the debtors.[7]

There appears to the court to be no need to separately find the precise amount of the debtor's default in each property or the amount of repairs or the extent to which the debtor profits from its subleases. Suffice it to note that the receiver and the debtor, wisely, have chosen to litigate these twenty disputes in all of which the sublease operations of the debtor yield a substantial profit. Rather, having concluded the taking of testimony, the court is satisfied that the issues raised here are primarily legal ones on the totality of the evidence adduced at the trial.

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[7] This decision affects some twenty properties in which the landlord-purchasers seek recovery. I note that the debtor has reduced its square footage from 30,000,000 to approximately 5,000,000 since these proceedings started. It is also to be noted here that the receiver's efforts to keep his payments to the landlord-purchasers current during his stewardship have been successful but with a four to six week lag in payments, i.e. May use and occupancy was paid by late June.

This case does not turn on resolution of the issue whether or not termination clauses such as those here,[8] are enforceable in these Chapter XI

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[8] The termination clause typical to these controversies reads as follows:

"ARTICLE XV

CONDITIONAL LIMITATION - - DEFAULT PROVISIONS

Section 15.01. Any of the following occurrences or acts shall constitute an event of default under this Net Lease: (a) if Tenant (regardless of the pendency of any bankruptcy, reorganization, receivership, insolvency or other proceedings, in law, in equity, or before any administrative tribunal, which have or might have the effect of preventing Tenant from complying with the terms of this Net Lease) shall fail to (i) make any payment of net rent within ten (10) days after such payment is due, or (ii) make any payment of additional rent or any other sum herein specified to be paid by Tenant within ten (10) days after such payment is due, or (iii) observe or perform any of Tenant's other covenants, agreements or obligations hereunder, within ten (10) days after Landlord shall have given notice to Tenant specifying such default (or in the case of a default or contingency which cannot with due diligence be cured within such ten (10) day period, or in the case of a default due to the acts or lack of action of any sub-tenant on the Demised Premises), if Tenant shall fail to proceed promptly to cure the same and thereafter to prosecute the curing of such default with all due diligence, it being intended in connection with a default not susceptible of being cured with due diligence within ten (10) days that the time of Tenant within which to cure the same shall be extended for such period as may be necessary to complete the curing of the same with due diligence, or (b) if Tenant shall file for reorganization or for an arrangement pursuant to the Bankruptcy Act of the United States or shall be adjudicated a bankrupt or

proceedings. Section 70b of the Bankruptcy Act, 11 U.S.C. §110b, a new provision in the 1938 revision of the Act of 1898, popularly styled as the Chandler Act, but "declaratory of former law," 4A Collier on Bankruptcy (14th ed.) ¶70.44[3], reads, in pertinent part, as follows:

> "[B]ut an express covenant that an assignment by operation of law or the bankruptcy of a specified party thereto or of either party shall terminate the lease or give the other party an election to terminate the same is enforcible."

This section, seemingly clear on its face as to Congressional purpose, means nothing if its essential significance is not to reject the notion that the language used is not to be

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insolvent or shall make an assignment for the benefit of its creditors or shall admit in writing its inability to pay its debts generally as they become due, or (c) if a receiver, trustee or liquidator of Tenant of all or a substantial part of the property of Tenant or of the Demised Premises shall be appointed in any proceeding brought by Tenant, or if any such receiver, trustee or liquidator shall be appointed in any proceeding brought against Tenant and if any such receiver, trustee or liquidator shall not be discharged within thirty (30) days after such appointment, or (d) if there be a levy of attachment on the leasehold interest of Tenant hereunder which is not discharged within thirty (30) days, (provided Tenant may contest same in the same manner as provided for liens in Section 6.05 hereof) or (e) if the Demised Premises shall have been left unoccupied and unattended for thirty (30) consecutive days."

accorded the meaning which the words spontaneously yield.[9]

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[9] Section 70b was amended in September, 1962 by Section 9 of Pub. L. 87-681. The purpose of the amendment is explained in House Report No. 1208, 87th Cong., 1st Sess., (1961) at 7. That explanation and the main amendment are irrelevant to the issue here. Strangely, however, and without comment, the clause of Section 70b, quoted above, underwent what appears to be a grammatical change. Prior to this 1962 amendment, the clause at issue here read as follows:

> "[B]ut an express covenant that an assignment by operation of law or the bankruptcy of a specified party thereto or of either party shall terminate the lease or give the other party an election to terminate the same shall be enforceable."

In the absence of expression by Congress as to the reason for the change in the verb structure, two assumptions are possible. The first - that in re-writing Section 70b, the change sounded better or the draftsmen thought so. The second -- that Congress limited the reach of the hortatory "shall be" to a potentially permissive "is." But the use of "shall" in legislation has never inhibited reading the more permissive "may" into the section. See Judges and Legislators, a speech by Mr. Justice Douglas delivered at the Centennial of Columbia Law School, printed in Legal Institutions Today and Tomorrow, Columbia University Press, (1959), pp. 274 et. seq. In any event, the court will treat the change as an intended one, so that proper focus may be given to the arguments concerning the court's equity power to avoid forfeiture.

The judicial gloss has not limited the reach of the clause and any suggestion otherwise fails.

In Finn v. Meighan, 325 U.S. 300 (1944), the Court, construing Section 70b, acknowledged that "an express covenant of forfeiture has long been held to be enforceable against the bankruptcy trustee," at 302, and concluded that it was no less so because in that case it was sought to be enforced against a Chapter X reorganization lessee-debtor. While this case involves a lessee-debtor seeking arrangement under the provisions of Chapter XI, Section 70b is no less applicable. This is so because Section 302 of the Act, 11 U.S.C. §702, says so, as did the Court of Appeals for this Circuit less than two months ago In the Matter of Queens Boulevard Wine and Liquor Corp. v. Blum, et. al., ___ F.2d ___ (June 11, 1974, Docket No. 73-1512, slip sheet opinion at p. 4117), and about which more later, and as earlier decisions had, Speare v. Consolidated Assets Corp., 360 F.2d 882 (2d Cir. 1966); Geraghty v. Kiamie Fifth Avenue Corp., 210 F.2d 95 (2d Cir. 1954).

Accordingly, the court agrees that the clause in Section 70b which lies at the heart of this case not only applies in these Chapter XI proceedings, but is to be given the plain meaning conveyed. Contention otherwise is foreclosed as a litigable issue.

The receiver and the debtor do not maintain that the cast of the termination clause at issue here is insufficient to bring this case within the reach of the language of Section 70b. The provision of these leases is clear and unequivocal in its import and leaves no room for the court to strain to construe it narrowly to prevent the forfeiture which must follow if the intent as expressed by the language is clear. And if anything is an express covenant within the meaning of Section 70b, this termination clause is that.

It is true that as a general rule, in the absence of an express stipulation or proviso for termination or forfeiture . . . the breach by a lessee of the covenants or stipulations of a lease does not work a forfeiture of the term, and the landlord's remedy is by way of a claim for damages. 49 Am. Jur.2d §1020. These debtors saw fit to provide clear and express language regarding termination for certain described breaches of the provisions of the leases. The receiver and the debtor refrain, and wisely so, from suggesting that the termination clause, resulted from unequal bargaining power, with the debtor as the underdog. Nor is it claimed

that the debtor was unaware of the impact of or potential reach of the clause it uniformly included in its business dealings with these landlord-purchasers. While it is true that the debtor could not predict with accuracy its financial plight years hence, this inability does not militate against reading the language as written. Certainly there is no rule against reading plain language plainly particularly where it refers to a position frequent in landlord-tenant relationships and where the debtor, as the architect of the relationship, and a sophisticated one at that, included the clause which it now finds so offensive and inhibiting.

Nor do the receiver and the debtor seriously press the Court to find waiver by or estoppel of the landlords; in any event the evidence of record is insufficient to support a finding that either of these events has occurred.

Rather the battle lines were drawn on the theory that an otherwise enforceable lease termination provision is rendered unenforceable in a bankruptcy case "when compelling equitable and policy considerations so require," In the Matter of Queens Boulevard Wine and Liquor Corp., supra., slip sheet opinion at 4120, particularly

since, as the court has been reminded again and again, it applies equitable principles. Bank of Marin v. England, 389 U.S. 99, 103 (1966). In short, the receiver and the debtor maintain, over the vigorous objection of these landlords, that, notwithstanding the statute and the cases cited, this court is called upon to determine equities, a process which here leads to a different and favorable result. Cf., Haller v. Esperdy, 397 F.2d 211 (2d Cir. 1968).

Simply stated, the debtor argues that given the congenial atmosphere of the rehabilitation purpose of Chapter XI, and a natural reluctance by an equity court to enrich these landlords at the expense of the debtor and its other creditors, the court should turn the landlords back and give the debtor a chance to confirm an arrangement with all of its creditors.

And so I turn to that issue.

While it may be true that "equity always leans against them" [forfeitures], Henderson v. Carbondale Coal and Coke Co., 140 U.S. 25, 33 (1891), it is no less true that such is not an absolute or inflexible rule nor that every forfeiture is "harsh and oppressive" in the words of Circuit Judge Van Devanter (as he then was) in Brewster v. Lanyon Zinc Co., 140 Fed. 801, 819

(8th Cir. 1905).[10] This general expression has lost none of its vitality. Jernigan v. Allstate Insurance Co., 272 F.2d 857 (5th Cir. 1959); In re Clerc Chemical Corp., 142 F.2d 672 (3d Cir. 1944). In the face of such Janus-like statements it is not surprising that there is no dearth of cases on either side of the question. Thus Smith v. Hoboken R.Co., 328 U.S. 113 (1946); Weaver v. Hutson, 459 F.2d 741 (4th cir. 1972); cert. denied 409 U.S. 957 (1972), over a vigorous dissent by Mr. Justice White, 409 U.S. at 957, who wondered whether or not the Court of Appeals had overruled Finn v. Meighan; In re Fleetwood, 335 F.2d 857 (3d Cir. 1964); In the Matter of Queens Boulevard Wine and Liquor Corp., supra., ___ F.2d ___ (2d Cir. 1974); and In re Lane Foods, 213 F.Supp. 133 (S.D.N.Y. 1963), have all declined immediate forfeiture. On the other hand Model Dairy Co. v. Foltis-Fischer, 67 F.2d 704 (2d Cir. 1933); Schokbeten Industries, Inc. v. Schokbeten Products Corp., 466 F.2d 171 (5th Cir. 1972); and F.J.M. Realty Corp. v. Ruggieri, 326 F.2d 281 (2d Cir. 1963), stand in the vanguard of cases enforcing the forfeiture resulting from enforcement of clear termination clauses.

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[10] Now the 10th Circuit.

While the debtor places magnified emphasis on the Queens Boulevard Wine and Liquor case, it presses for denial of the landlord's motion by relying also on Smith v. Hoboken R.Co., Weaver v. Hutson, and In re Fleetwood, all supra. In each of these cases there was present a strong public interest which militated against forfeiture. The judicial tenderness shown the reorganizing debtors in those cases was not based on solicitude for them but rather in an abundance of concern for the public. Smith involved a plagued railroad, an enterprise always of concern to Congress and the courts because of its impact on the nation. Palmer v. Massachusetts, 308 U.S. 79, 87 (1939). Weaver and Fleetwood both involved, in Chapter X proceedings, large public investment in those debtors and an expression of concern by the Securities and Exchange Commission that enforcement of the termination clauses would end the debtor's operation to the detriment of the public debt. While it is true that in Weaver the court declined to grant a "windfall" possession to the pressing landlord, the concern there was for the public investors who would be wiped out unless there was

a res which the debtor could operate en route to successful reorganization.

The debtor here is not seeking reorganization under Chapter X. Indeed, in the absence of public debt or public holding of its stock, the appropriate vehicle is the Chapter XI statutory scheme which it chose. SEC v. American Trailer Rental Co., 379 U.S. 594, 613-618 (1965). But while Chapter XI may have the laudable purpose of rehabilitating strapped debtors, it is no guarantee of continued existence to every plagued company. In re Webcor, Inc., 392 F.2d 893 (7th Cir. 1968), cert. denied 393 U.S. 837 (1968) sub. nom. Silver, Inc. v. Webcor, Inc. It is certainly no guarantee that this court's broad power of injunction under the scheme of Chapter XI will be utilized to bar the landlords from their property under clear and plain speaking bargains made with debtors whose financial condition may have become precarious years later and where the landlords have been seriously impeded, a fact noted by Judge Brieant of this court in Matter of Unishops, Inc., unreported, 73 B 1208 (S.D.N.Y. March 4, 1974), affirmed without comment on this point, 494 F.2d 689 (2d Cir. 1974), and very much present here.

And even Matter of Lane Foods, Inc., 213 F.Supp. 133 (S.D.N.Y. 1963), seems to recognize that relief to the debtor there would have to come from the bankruptcy court's equitable power to enjoin a pressing landlord "to stay an eviction and to afford the debtor a reasonable opportunity to re-negotiate with his landlord or to find new premises...," at 136. (Emphasis supplied.) Judge Weinfeld did not hold that the termination clause meant less than the landlord there supposed it did. He merely deferred enforcement by the landlord on facts much more appealing from that debtor's standpoint; and even such exercise of restraint would not guarantee to the debtor that the landlord's constrained forebearance would continue after the court's jurisdiction had come to an end. The single restaurant entrepreneur in Lane Foods was given no assurance by the court that the landlord would negotiate a new lease in place of the one Judge Weinfeld thought had terminated.

So, in the final analysis, debtor's emphasis on Matter of Queens Boulevard Wine and Liquor, Corp., ___ F.2d ___ (2d Cir. June 11, 1974) is well placed for, "under the particular circumstances" there

present, a divided Court of Appeals panel found persuasive the holdings in Weaver v. Hutson and In re Fleetwood Motel Corp., both discussed, supra., that "a lease termination provision [is] unenforceable when compelling equitable and policy considerations so require," slip sheet opinion at 4120.

But the facts present there are not the facts present here. In Queens Boulevard, as in Lane Foods, the debtor conducted its business from a single site, the site which that landlord sought to reclaim. There was virtually no impedance of the landlord for rent arrearage was but one month, and there was a security deposit available to the landlord for application against due rent. Tender was once made on certain conditions which the landlord found to be satisfactory but later refused by a landlord motivated by visions of a more affluent tenant for the premises. Finally that debtor's arrangement stood on the verge of confirmation by reason of the debtor's success in its Chapter XI operations. Moreover, the Court of Appeals found evidence which gave weight to the debtor's argument that the landlord might have been estopped from seizing on the "bankruptcy clause" of the lease. See Speare v. Consolidated Assets Corp.,

360 F.2d 882, 887 (2d Cir. 1966). The "bankruptcy clause" was amended to permit termination "upon the condition that there be no forfeiture if obligations under the lease should remain unaffected by the bankruptcy proceedings and if the tenant should continue to comply with the terms of the lease, including prompt payment of rent." Slip Sheet opinion at 4115.

The debtor here neither presents the appealing facts of Queens Boulevard nor any of "the particular circumstances" there. The defaults here are staggering. Only substantial divestment of some of its warehouses has given the receiver the wherewithall to operate even marginally. Many of the landlords have had to invest further funds of their own to keep mortgagees and tax gatherers at bay. These twenty properties are not the debtor's only warehouses, although, to be sure, they do yield profits of varying amounts. Here, there has been no tender, nor could there be in light of the aggregate of the pre-petition debt due these landlords who make up the bulk of the debtor's creditors. The termination clauses here speak plainly and the debtor gave itself no ameliorative options such as the Queens Boulevard

debtor enjoyed. The landlords' assaults have continued unabated without the kind of forebearing action taken by the Queens Boulevard landlord. They have consistently pressed for their end of the bargain.

Finally, the debtor's offer to its creditors, including these landlords, carries pie-in-the-sky elements. The debtor's arrangement (popularly styled its plan) calls for full payment of all pre-petition liabilities -- but not at the time the court confirms the arrangement; rather over many years. The arrangement ignores the reality -- that even if the court continues to keep the landlords at bay until the proposal is confirmed, it does not ensure that the unwilling landlords will relent and re-negotiate the terminated leases. At best, the landlords may insist on new leases far more favorable to them thereby inhibiting the debtor's chances of yielding enough from its operation to pay off its creditors. Thus, the debtor's plan may not even be feasible much less in the best interests of its creditors, indispensable ingredients precedent of the court's duty to confirm. Section 366(2)

of the Act, 11 U.S.C. §766(2); In re Graco, Inc., 364 F.2d 257 (2d Cir. 1966); Technical Color and Chemical Works v. Two Guys from Massapequa, Inc., 327 F.2d 737 (2d Cir. 1964). The debtor does not even suggest how it will garner the acceptances by the landlords to its long term proposals, also a condition precedent to confirmation under Section 362(1) of the Act, where, by simply waiting, the landlords could regain their properties. No case has been cited for the proposition that non-enforcement during the Chapter XI precludes the enforcement after a debtor has emerged from the court and Queens Boulevard does not appear to go that far.

But this last observation is by the way for I am satisfied that given the enforceability of the lease provision here in issue as mandated by Section 70b of the Act and, inter alia, Finn v. Meighan, supra, the so-called equitable concerns are simply not robust enough to turn these landlords away. There is simply no strong public interest here to support such a result. The so-called "windfall" to these landlords is part of what they bargained for and, as Circuit Judge Hays observes

in his dissent in Queens Boulevard, slip sheet opinion at 4124-5, it is a factor in every case because unless a landlord could better himself he would never press for a judgment declaring a lease terminated.

The creditor tentatively suggests that the court could construe the leases here to be equitable mortgages and concludes that such construction should yield a result contrary to that made here. The difficulty with that is that the debtor and these landlords contracted for a landlord-tenant relationship and the efforts by the debtor to have the court characterize the relationship as something else comes too late in the day. See Woodmen of the World Life Insurance Society v. Knudsen, 275 F.2d 440 (5th Cir. 1960).

The court concludes that the termination clauses in issue are enforceable against the debtor, and on the facts here, and in the exercise of its equitable jurisdiction, finds and concludes that they should be enforced.

Each landlord is to submit an order, within five (5) days, granting the relief sought by each.

DATED: NEW YORK, NEW YORK
JULY 23, 1974

Rod Ballard

BANKRUPTCY JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In the Matter

of

PLAN OF ARRANGEMENT

D. H. OVERMYER CO. INC., (Alabama)	No. 73 B 1126
D. H. OVERMYER CO. INC., (Arizona)	No. 73 B 1127
D. H. OVERMYER CO. INC. OF OHIO	No. 73 B 1128
D. H. OVERMYER CO. INC., (Ohio)	No. 73 B 1129
D. H. OVERMYER CO. INC., (California)	No. 73 B 1130
D. H. OVERMYER CO. INC., (Colorado)	No. 73 B 1131
D. H. OVERMYER CO. INC., (Connecticut)	No. 73 B 1132
D. H. OVERMYER CO. INC., (Delaware)	No. 73 B 1133
D. H. OVERMYER CO. INC., (Florida)	No. 73 B 1134
D. H. OVERMYER CO. INC., (Georgia)	No. 73 B 1135
D. H. OVERMYER CO. INC., (Illinois)	No. 73 B 1136
D. H. OVERMYER CO. INC., (Indiana)	No. 73 B 1137
D. H. OVERMYER CO. INC., (Kansas)	No. 73 B 1138
D. H. OVERMYER CO. INC., (Kentucky)	No. 73 B 1139
D. H. OVERMYER CO. INC., (Louisiana)	No. 73 B 1140
D. H. OVERMYER CO. INC., (Maryland)	No. 73 B 1141
D. H. OVERMYER CO. INC., (Michigan)	No. 73 B 1142
D. H. OVERMYER CO. INC., (Massachusetts)	No. 73 B 1143
D. H. OVERMYER CO. INC., (Minnesota)	No. 73 B 1144
D. H. OVERMYER CO. INC., (Mississippi)	No. 73 B 1145
D. H. OVERMYER CO. INC., (Missouri)	No. 73 B 1146
D. H. OVERMYER CO. INC., (Nebraska)	No. 73 B 1147
D. H. OVERMYER CO. INC., (Nevada)	No. 73 B 1148
D. H. OVERMYER CO. INC., (New Jersey)	No. 73 B 1149
D. H. OVERMYER CO. INC., (New Mexico)	No. 73 B 1150
D. H. OVERMYER CO. INC., (New York)	No. 73 B 1151
D. H. OVERMYER CO. INC., (North Carolina)	No. 73 B 1152
D. H. OVERMYER CO. INC., (Oklahoma)	No. 73 B 1153
D. H. OVERMYER CO. INC., (Oregon)	No. 73 B 1154
D. H. OVERMYER CO. INC., (Pennsylvania)	No. 73 B 1155
D. H. OVERMYER CO. INC., (Rhode Island)	No. 73 B 1156
D. H. OVERMYER CO. INC., (Tennessee)	No. 73 B 1157
D. H. OVERMYER CO. INC., (Texas)	No. 73 B 1158
D. H. OVERMYER CO. INC., (Utah)	No. 73 B 1159
D. H. OVERMYER CO. INC., (Virginia)	No. 73 B 1160
D. H. OVERMYER CO. INC., (Washington)	No. 73 B 1161
D. H. OVERMYER CO. INC., (Wisconsin)	No. 73 B 1162
DHORE COMPANY, INC.,	No. 73 B 1189
OVERMODAL TERMINALS, INC.	No. 73 B 1175

Debtors.

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The Debtors above named, herein propose the following Plan of Arrangement:

I.

ADMINISTRATION AND PRIORITY CREDITORS: All administration and priority creditors shall be paid in full in cash upon confirmation of this Plan of Arrangement unless otherwise agreed upon between the Debtors and administration and/or priority creditors.

II.

CLASSES OF GENERAL CREDITORS: General Creditors shall be divided into the following classes:

Class 1 Class 1 shall consist of landlords of real property leased by written instruments to the Debtor or Debtors at the time of the entry of an Order of Confirmation of this Plan of Arrangement.

Class 2 Class 2 shall consist of all other creditors of this estate, including landlords in possession of their respective real properties, under Bankruptcy Court ordered termination of leases with any of the Debtors.

III.

PAYMENT TO GENERAL CREDITORS: Payment to general creditors shall be as follows:

(a) Class 1 creditors shall be paid 100% of their respective claims as finally allowed in these proceedings, in cash upon confirmation of the Debtors' Plan of Arrangement, or such other amount as may be agreed upon between the respective landlord and respective Debtor. Receipt of payment shall cure any and all alleged defaults of the Debtors.

(b) Class 2 creditors shall be paid 100% of their respective claims as finally allowed in these proceedings by payment of 1% thereof two (2) months from the date of the confirmation of these proceedings, and a like payment of 1% at the end of each succeeding two (2) months until payment of the consideration required to be paid herein has been paid in full, deferred payments to bear no interest.

1. No instrument or other evidence of indebtedness shall be issued by the Debtor or Debtors to the respective creditors for their participation as Class 2 creditors in this Plan of Arrangement.

IV.

The Debtors, at or prior to the entry of an Order of Confirmation of these proceedings, will seek a statutory merger of the respective Debtor corporations into D. H. OVERMYER CO. INC. (Ohio) or a corporation to be formed pursuant to the laws of the State of Delaware. In lieu of the foregoing, the Debtors reserve the right to seek a substantive consolidation of assets and liabilities pursuant to order of the Bankruptcy Court.

The payment to creditors herein shall be a payment from the surviving corporation into which the Debtors have been merged or consolidated and only one payment will be effected notwithstanding the existence of corporate guarantees in which one of the Debtors may have guaranteed the payment or performance of the obligations or undertakings of another debtor.

V.

In the event that any deferred payments required to be made under this Plan of Arrangement shall not be paid as and when due, an additional 60 days grace period from the due date shall be automatically granted before a default may be called by any creditor or committee of creditors.

VI.

Until payment has been effected to Class 1 and 2 creditors, all inter-company debts and obligations of the Debtors shall be subordinated and postponed in payment to payments to Class 1 and 2 creditors.

Dated: New York, New York
January 3, 1974

D. H. OVERMYER CO. INC. (Alabama)
D. H. OVERMYER CO. INC. (Arizona)
D. H. OVERMYER CO. INC OF OHIO
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D. H. OVERMYER CO. INC. (Nevada)
D. H. OVERMYER CO. INC. (New Jersey)
D. H. OVERMYER CO. INC. (New Mexico)
D. H. OVERMYER CO. INC. (New York)
D. H. OVERMYER CO. INC. (North Carolina)
D. H. OVERMYER CO. INC. (Oklahoma)
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D. H. OVERMYER CO. INC. (Pennsylvania)
D. H. OVERMYER CO. INC. (Rhode Island)
D. H. OVERMYER CO. INC. (Tennessee)
D. H. OVERMYER CO. INC. (Texas)
D. H. OVERMYER CO. INC. (Utah)
D. H. OVERMYER CO. INC. (Virginia)
D. H. OVERMYER CO. INC. (Washington)
D. H. OVERMYER CO. INC. (Wisconsin)

By: /s/ Daniel H. Overmyer
Daniel H. Overmyer, President

OVERMODAL TERMINALS, INC.

By: /s/ Daniel H. Overmyer
Daniel H. Overmyer, President

DHORE COMPANY, INC.

By: /s/ Daniel H. Overmyer
Daniel H. Overmyer, President

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

In the Matter
of

D. H. OVERMYER,

Debtor.

No. 73 B 1127

United States Court House
Foley Square, New York, N.Y.

January 14, 1974
5:00 o'clock p.m.

LANDLORD'S APPLICATION FOR POSSESSION (BOSTON 6 AND 7 - WACHTELL, LIPTON, ROSEN & KATZ)

Before:

HON. ROY BABITT, Referee In Bankruptcy

BARRY W. RAYVID
Official Court Reporter
U.S. Courthouse (R. 230)
Foley Square, New York, N.Y. 10007

APPEARANCES:

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-and-
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-and-
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BY: LEONARD M. ROSEN, ESQ., Of Counsel
-and-
THEODORE GWERTZ, ESQ., Of Counsel

PROCEEDINGS

MR. ROSEN: Your Honor, I would like to take 13 first.

THE REFEREE: Which one are we starting with?

MR. ROSEN: Number 13, Your Honor.

THE REFEREE: Which property?

MR. ROSEN: Boston 6 and 7. I would like to introduce Arthur Stern to the Court, a member of the Bar in the State of New Jersey. I would like to move his admission.

THE REFEREE: Pro hac vic, motion granted.

MR. ROSEN: Our witness is Harold Kaplan.

HAROLD KAPLAN, having been duly sworn by Honorable Roy Babitt, was examined and testified as follows:

THE REFEREE: Please give your full name and home address to the reporter.

THE WITNESS: Harold Kaplan, Claridge

House, Claridge Road, Upper Montclair, New Jersey.

MR. ROSEN: Your Honor, I would like to submit an original brief. I will defer making any kind of legal argument tonight.

THE REFEREE: I am looking at the motion called Sagin & Kaplan, am I not?

MR. ROSEN: That is correct.

DIRECT-EXAMINATION BY MR. ROSEN:

Q Mr. Kaplan, are you one of the plaintiffs in this action?

A I am.

Q What is your occupation?

A Real estate.

Q What do you do in connection with real estate?

A Investor, investor-builder, buy and sell.

Q Are you the owner of certain premises located in Framingham, Massachusettes together with another individual?

A Yes, I am.

Q Give us the name of the other individual?

A George Sagin.

Q When did you and Mr. Sagin acquire those premises?

A In July of 1968.

Q From whom did you acquire them?

A Overmyer.

Q Did you then lease the premises to anyone?

A When we bought it, we leased it back to Overmyer.

Q I hand you a document dated July 11, 1968 and ask you whether that is a copy of the lease which you testified to?

A Yes, it is.

MR. ROSEN: I would like to have that marked as Applicant's Exhibit "1".

THE REFEREE: Is there any objection to having that admitted in evidence?

MR. SANDLER: No objection.

MR. BLUM: No objection if the witness will state whether there is any amendment to this document so we know it's the completed document.

THE WITNESS: No further amendments

that I know of.

Q Has there been any amendment to the document?

A No.

(At this time, the said document was so marked as Applicant's Exhibit "1" in evidence.)

Q At the same time, did you enter into any other agreement relative to the lease? I can refresh your recollection.

A Please do.

Q Did you enter into this document (indicating) at the time you entered into the lease?

A Yes.

Q With D. H. Overmyer, Inc., an Ohio corporation?

A I did.

MR. ROSEN: I would like to offer this as Applicant's Exhibit Number "2" in evidence, Your Honor.

MR. BLUM: It's not relevant.

MR. ROSEN: Do you object to it?

MR. BLUM: I don't think it's relevant.

THE REFEREE: Overruled.

Mark it.

(At this time, the said document was so marked as Applicant's Exhibit "2" in evidence.)

Q Did there come a time when you issued an instruction to anyone to give a notice of termination of the lease?

A Yes.

Q To whom did you give that instruction, sir?

A My attorney, Mr. Arthur Stern.

Q I show you a copy of a letter dated December 4, 1973, addressed by Mr. Arthur Stern to Robert Herzog, the trustee, and ask you whether or not the contents of that letter expresses your instructions to Mr. Stern?

A Yes.

MR. ROSEN: I would like to ask the receiver whether he will admit receipt of a copy of this letter dated December 4th, addressed by Mr. Stern to Mr. Herzog, of which a copy was also sent to Mr. Herzog's attorneys, Booth, Lipton & Lipton? I have the receipts of the post office.

MR. BOOTH: We acknowledge receipt on December 6th.

MR. ROSEN: Is that then admitted?

MR. SANDLER: On December 6th.

(At this time, the said document was so marked as Applicant's Exhibit "3" in evidence.)

Q As of November 16, 1973, can you tell us whether any rents were unpaid pursuant to the lease?

A Yes.

Q What was unpaid?

A October and November.

Q Can you tell us the amounts that were unpaid for each of those months?

A Sixteen thousand six hundred thirty-eight dollars and thirty-four cents, plus taxes of seventy-one hundred thirty-eight dollars.

Q For what months?

A Sixteen thousand six hundred thirty-eight dollars was the rent, and taxes were seventy-one hundred thirty-eight dollars. That was for the month of October, 1973.

Q What was unpaid for the month of November?

A A similar amount.

Q Did you ever receive any check in

payment of either of those, any of those amounts?

A Yes, we did.

Q Would you describe the circumstances under which you received that check and when you received it?

A Well, we received a check for that, together with another property that we owned in New Orleans, on November 1, 1973. But, the check was post-dated to the 7th of November, 1973.

Q What did you do with that check after you received it?

A We deposited it and asked our bank to collect the funds.

Q Will you tell the Court what happened, please?

A It came back, insufficient funds.

Q Is the piece of paper that you have a copy of the check which you received and deposited and which came back so marked?

A Yes (indicating), this is one of them. That's for Framingham.

MR. ROSEN: I would like to mark this as Applicant's Exhibit Number "4".

THE REFEREE: By the way, you are all

responsible for your own exhibits.

MR. BLUM: Did he testify this is a returned check?

MR. ROSEN: Yes, he did.

MR. BLUM: All right.

MR. ROSEN: I would ask that this check be admitted in evidence, a copy of this check.

MR. BLUM: No objection.

MR. SANDLER: No objection.

(At this time, the said document was so marked as Applicant's Exhibit "4" in evidence.)

Q Have you ever received payment of the October or November rents or of the October or November installment of taxes which are unpaid?

A No, I have not.

Q Is there a mortgage on the premises?

A Yes, there is.

Q Do you recall the original amount of the mortgage, approximately?

A One and a half million dollars.

Q Do you recall who the holder of the mortgage is?

A Provident Institute - - Provident of

Boston - - I don't remember the exact name unless you have the paper - - Provident Institution for Savings of Boston.

Q Mr. Kaplan, can you characterize the way in which Overmyer generally paid their rent? Was it timely or late?

A It was all late.

MR. SANDLER: Objection, what period are we talking about?

MR. ROSEN: The years 1970, '71, '72, '73.

MR. BLUM: Objection.

MR. SANDLER: Irrelevant.

THE REFEREE: Overruled.

Did you say generally late?

THE WITNESS: Yes.

THE REFEREE: How late?

THE WITNESS: Three months, four months, two months sometimes.

Q Can you specifically give us for 1973 only, some sample late period for the rent?

A An average of three months late all the time.

Q Under the lease, was Overmyer

initially required to pay real estate taxes?

A Yes.

Q To whom were they required to pay those taxes?

A To the mortgagee - - no, they were supposed to pay the taxes to the town.

Q Did that procedure ever get changed later on?

A Yes.

Q Can you tell us the change that occurred?

A Well, it changed later on because the taxes were not paid on time and my mortgagee had a clause in his lease that they had a right to collect it monthly instead of the town if they were not paid on time, and they enacted that manner of payment.

Q Thereafter it was supposed to be paid by Overmyer to the mortgagee?

A Yes, monthly.

Q Did there come a time when the mortgagee took any action with respect to that?

A Yes, they did. They were continually having trouble - -

MR. BLUM: Objection, hearsay, Your Honor.

MR. ROSEN: I withdraw the question, Your Honor.

Q I show you a letter dated February 11, 1973, addressed to George Sagin and Harold Kaplan and ask you if you have ever received that letter?

A Yes.

MR. ROSEN: I would like to put it in - -

MR. BLUM: It's a hearsay statement; it's a hearsay letter, period.

MR. ROSEN: This letter is a notice from the mortgagee that it refused to have anything further to do with Overmyer in terms of collecting taxes because of its repeated apparent refusal to pay.

MR. BLUM: Objection to counsel's statement.

THE REFEREE: I will allow it without what was asserted by Mr. Rosen's characterization. It's a letter received by Mr. Kaplan.

MR. SANDLER: We object to the admission without an opportunity to cross-examine the writer of the letter. We understand that a tax escrow account might have been initiated by the - -

THE REFEREE: There is always something. People are getting ground up and it is overruled, you have an exception.

Everybody is getting ground up; he has hung up people for millions of dollars; but, everyone is ganging up on him. Mark that as an exhibit.

(At this time, the said document was so marked as Applicant's Exhibit "5" in evidence.)

Q Did there come a time, Mr. Kaplan, after which you were required to pay the taxes directly to the mortgagee?

A Yes.

Q Was that in approximately February of 1972?

A About that time.

Q Thereafter, you collected the taxes monthly from Overmyer, is that correct?

A Yes, I did.

Q You did receive tax payments from Overmyer for all months through September 1973?

A I did.

Q You have not received October or November taxes?

A No, I haven't.

Q Did you ever receive from Overmyer a copy of any sub-lease or of any assignment of the lease? Did you ever receive either of those kinds of documents from Overmyer?

A No, I never have.

Q Did you ever request from Overmyer copies of sub-leases with respect to the premises?

A I did.

Q I am speaking about the particular lease provisions that requires some of these things.

THE REFEREE: The lease has been marked, hasn't it?

MR. ROSEN: Yes, it has been marked, Your Honor.

Q Did any mortgage payments come due during the period of October-November-December, 1973 and January, 1974?

A Yes.

MR. BLUM: Your Honor, I think he is leading the witness in every question.

THE REFEREE: You are leading. I hoped you were going to expedite this, but not by your testimony.

MR. ROSEN: I am sorry, Your Honor.

Q Have you made any mortgage payments? Did you make a mortgage payment in January, 1974?

A Yes, I did.

Q What was the amount of that mortgage payment?

A Eleven thousand six hundred thirty-eight dollars and that was for the mortgage payment. And, I also - - did you ask me about the mortgage payments?

Q Yes, I did.

A You didn't mention taxes.

Q No, I didn't. Did you make a mortgage payment for December, 1973?

A Yes, the same amount.

Q November, 1973?

A I did.

MR. BLUM: Objection. I fail to see

the relevancy of his making mortgage payments.

THE WITNESS: I did.

Q Have you made the tax escrow payments for those months?

A I did.

MR. BLUM: He is leading the witness, Your Honor.

THE REFEREE: How else would you ask him?

MR. BLUM: He can't testify.

THE REFEREE: How would you ask him the question?

MR. BLUM: I would ask him to recite what he has done in each of these months.

THE REFEREE: Sit down. He is trying to expedite this so we expedite the trial.

MR. BLUM: Mr. Rosen can take the stand and testify better than this witness.

THE REFEREE: There is nothing about this that is untrustworthy. Overruled.

Q In light of your failure to receive the October and November rent and tax payments from Overmyer, what was the source of funds you used to make those payments?

A I personally advanced it from my partner and myself. My partner is very ill and unable to comprehend anything about this at this time.

I used funds from my own account and paid them.

Q Is Overmyer required to make repairs with respect to the premises pursuant to the lease?

MR. BLUM: Objection, the lease speaks for itself.

Q Have you been to the premises within the last four months?

A I was there in October, 1973.

THE REFEREE: I think it reaches a point where you are not leading him, you are putting the words into his mouth. It's one thing to expedite and another to make your record.

Q What did you observe upon your visit to the premises with respect to the condition?

MR. SANDLER: When was this?

THE WITNESS: October.

MR. SANDLER: When?

THE WITNESS: 1973.

Q What did you observe at the time you

visited the premises?

A I observed it was in a general bad state of repair. I observed that a roof repair was needed and roof painting was needed. I observed that the outside walls were cracked and needed a painting; I observed that there were holes and depressions in the parking lot and drive-ways that needed repairs - -

MR. KLEINERMAN: Your Honor, we are going to have to respond to this on another date. If he can go a little slower, we will be able to know what he observed and ask our witness with respect to that.

THE REFEREE: Well, the roof needs a painting, the walls need painting, you have depressions in the parking area - -

MR. KLEINERMAN: The outside walls are cracked?

THE WITNESS: Not all, some.

MR. KLEINERMAN: After that what did you say?

THE WITNESS: I said that they should have the holes and depressions repaired in the parking lot and drive-ways and resurface

same. I will say now some of the floors in the inside need repairing and the inside is in bad need of painting; that the drainage is clogged up and should be repaired. Other than that, it's okay.

Q Do you have any experience with respect to what this kind of work costs?

MR. BLUM: Objection, unless he lays a foundation for this.

THE REFEREE: He is asking him about his experience.

Do you have any experience?

THE WITNESS: Yes, I do.

THE REFEREE: What is the basis?

THE WITNESS: Having done this in the last thirty-five to forty years.

THE REFEREE: In the construction business?

THE WITNESS: Yes.

THE REFEREE: Painting?

THE WITNESS: Giving out these jobs to sub-contractors on various properties that we own.

Q Can you give us your best estimate of

what it would cost to do these jobs?

A Yes, it would cost about ninety-three thousand dollars.

Q If Overmyer was prepared today to reinstate all its defaults and wanted to affirm the lease, would you consider continuing your relationship with them if you have a choice?

A I would rather not.

Q Why not?

A Only because of the difficulties of collecting my rent and seeing that the taxes are paid, and continual losses - - lawsuits - - hiring lawyers to collect the rent is not my idea of wanting to own property that way. I would rather not have them as a tenant.

THE REFEREE: Where is this property?

THE WITNESS: In Framingham, Massachusettes.

THE REFEREE: One property?

THE WITNESS: One property.

THE REFEREE: Are there tenants there?

THE WITNESS: Yes.

THE REFEREE: Good tenants?

THE WITNESS: I don't know. I know when I was up there it was filled with tenancies. I don't know who they are, I couldn't get the names.

THE REFEREE: You don't know?

THE WITNESS: No.

THE REFEREE: Do you know what kind of leases they have?

THE WITNESS: No, I don't, Your Honor. I couldn't get that.

MR. ROSEN: Your Honor, there are just two things I would like to be able to submit further proof on.

One is we are advised that the corporation which is the lessee of this property has been dissolved or is subject to dissolution under Massachusettes law and Massachusettes Counsel is apparently trying to obtain or send to us a certificate indicating its dissolution.

THE REFEREE: You mean the sub-lessee?

MR. ROSEN: The Overmyer Corporation itself.

THE REFEREE: Overmyer?

MR. ROSEN: Overmyer of Massachusettes, that is correct.

MR. HERZOG: Is this for non-payment of franchise taxes?

MR. GWERTZ: Failure to file certain reports.

MR. ROSEN: The other question I have is I would like to leave open - - I think at the last hearing you said with respect to the question of the laws of other jurisdictions you would accept briefs or memoranda indicating the case law rather than the testimony of an attorney.

If it becomes significant we would like the opportunity to submit any Massachusettes law that may be relevant to this question.

THE REFEREE: There shouldn't be any objection to that.

MR. ROSEN: Your Honor indicated you wouldn't require that but you would read the cases yourself if it became relevant.

I have no other questions, Your Honor.

THE REFEREE: Mr. Sandler?

CROSS-EXAMINATION BY MR. SANDLER:

Q Mr. Kaplan, when you purchased this property in 1968, I believe it was, did you have an appraisal made?

A No.

Q Did you yourself put a value on the property?

A Yes.

Q What was your own value that you put on it?

A The price that I paid for it.

Q What price did you pay?

A Around two million dollars.

Q With about, approximately, five hundred thousand dollars cash and the balance in the form of the existing mortgage?

A Five hundred fifty thousand dollars cash and the balance of the existing mortgage.

Q That mortgage was in position when you acquired title to the property?

A That's right.

Q The warehouse was already built when you acquired it?

A Yes, sir.

Q You simultaneously leased it back?

A Yes, that's right.

Q In terms of putting a value on that, as you describe it, if you had purchased that property without leasing it back but operating it yourself, would you have put the same value on it?

A Same value.

Q Did there come a time subsequent to 1968 when you entered into negotiations with Mr. George Hayes of the Overmyer organization to buy the Overmyer leasehold interest?

A In 1968?

Q Any time after 1968.

A Yes - - not negotiations. I mentioned it to him; I was so fed up and so tired of trying to collect my rent, I would like to collect my money and get them out.

Q There were discussions on your acquiring the leasehold interest on more than one occasion?

MR. ROSEN: I object to this line of questioning.

MR. SANDLER: It was on direct-examination as to what the value of the subject property was.

MR. ROSEN: I believe it is irrelevant.

THE REFEREE: I will let it go.

Q In what you describe as your conversation with Mr. Hayes concerning your possible purchase of Boston 6 and 7 - -

A (Interposing) Mr. Hayes told me that I am wasting my time talking to him, that the whole crux of the Overmyer business is to hold onto these leases and not to sell them at any price.

Q What was the price mentioned notwithstanding what Mr. Hayes said?

A I mentioned a price.

Q Did you say you would give him two hundred fifty thousand dollars for each one or five hundred thousand dollars for the pair?

A No.

Q What price did you mention?

A I mentioned at one time I might be interested in getting rid of this type of business, that I might pay one hundred thousand dollars for Framingham and one hundred thousand dollars for New Orleans so that I would have peace of mind and - -

Q For a one hundred thousand dollar

payment Overmyer would surrender its interests in its lease so you would own the fee unencumbered by any lease?

A At that time he said, "Not interested."

Q That was rejected?

THE REFEREE: Now, let's get on. There is clearly no relevancy.

MR. SANDLER: Your Honor, the landlord himself - -

THE REFEREE: Let's get to the issue now.

MR. SANDLER: Our issue is that there was a value to the leasehold. The landlord himself has testified offering one hundred thousand dollars to buy it.

THE REFEREE: I am certain there is. I thought we are dealing with Framingham?

MR. SANDLER: Boston 6 and 7 is Framingham.

THE REFEREE: Didn't he testify to New Orleans?

MR. ROSEN: Mr. Kaplan and Mr. Sagin own two properties, one is Framingham and the other is Weswego (phonetics) with respect

to which the debtor gave it back, where he stands to lose a good deal of money.

That's neither here nor there. They have given him the loser and they are complaining now.

MR. SANDLER: I move to strike Mr. Rosen's remarks.

THE REFEREE: What about Framingham? You said Framingham and New Orleans?

THE WITNESS: Yes.

THE REFEREE: I thought he said Birmingham.

THE WITNESS: Framingham is outside of Boston.

THE REFEREE: I thought you said Birmingham. You were willing to purchase that lease at one time?

THE WITNESS: I was at one time.

THE REFEREE: What time was that?

THE WITNESS: About two years ago.

Q You had more than one discussion with Mr. Hayes about purchasing, did you not?

A I may have in an offhand way. I came there to try to collect rent and I said, "I would

rather buy it than live through this." At one time, the last day, if I may, sir, the last day taxes were not paid and I had to run down to try to save my property but they always paid the last day and saved it.

Q In terms of buying the Overmyer lease I ask you to search your recollection and is it possible that such a conversation could have been held with Mr. Hayes either on the telephone or in the office within the last twelve months?

A I couldn't answer that; I am not sure. It could be possible. I doubt it, so I think it is about two years ago.

Q When you purchased this property, who did you negotiate with?

A Mr. Hayes.

Q At the time of your negotiations with Mr. Hayes, how was the rent to be paid to you arrived at in those negotiations?

A No special formula that I can remember now.

Q Wasn't the return on your cash investment discussed, the percentage return?

A This was, yes. It came out to a

return on my investment.

Q Well, you are a professional real estate man?

A Yes.

Q You were investing five hundred fifty thousand dollars?

A Yes.

Q Didn't you discuss with the person you were dealing with what kind of a return you wanted?

A I would buy the property without any return. I wanted the property, not the tenants.

Q You wanted the property and not the tenant. Which tenant do you mean, our sub-tenant or Overmyer?

A Overmyer.

Q You wanted this property without the Overmyer lease?

A What I paid for it I felt was good value to buy it. I couldn't get a statement of Overmyer how good he was.

I bought it on the strength of the real estate alone; I turned down other places and took Boston.

Q The strength of the real estate would

be the ability to rent space whether Overmyer was in the picture or not?

A That is correct.

Q Based on your evaluation of that property you wanted that property even if you didn't make any cash return; you thought it was a good property?

A That is right.

Q Do you have any knowledge at this time as to what the receiver makes or earns from Boston 6 and 7?

A No.

Q If I told you that the receiver earns in excess of one hundred thousand dollars a year, would that surprise you?

A Very much.

THE REFEREE: That's Boston 6 and 7?

MR. SANDLER: It's Framingham.

Q Do you know what the receiver, and before the receiver the debtor, collected from subtenants in those premises?

A No, I don't, I couldn't get that.

THE REFEREE: Are there renewal options in this lease, sir?

THE WITNESS: It's a twenty-year lease with a twenty-year renewal option.

Q I believe there is fourteen years to go, so we are talking about a thirty-fiveyear life expectancy?

A Thirty-five years.

THE REFEREE: Which could conceivably have asset value of over one hundred thousand dollars a year?

THE WITNESS: Unless the company loses money.

THE REFEREE: I mean, at the present time? At the present time, it's a good one?

THE WITNESS: If he is right in what he says and if it could continue, it would be good. I don't believe it is. Then, these things turn around. It happens over and over again.

THE REFEREE: I don't know what is going to happen in thirty-four years.

THE WITNESS: New Orleans was good when I offered one hundred thousand dollars.

THE REFEREE: And now?

THE WITNESS: Mr. Overmyer over-built

the town.

Q Did Mr. Overmyer over-build Framingham?

A Yes.

THE REFEREE: It's presently a good property?

THE WITNESS: Yes.

THE REFEREE: You don't know who the tenants are?

THE WITNESS: Yes.

THE REFEREE: How do you know?

THE WITNESS: I have my tenants and know the area.

Q What do you think you can rent the space in Boston for per square foot to your own tenants?

A One dollar a square foot net.

Q What do you mean by "net"?

A That the tenant pays the taxes, insurance and other upkeep of the property.

Q How many square feet are there in Boston 6 and 7?

A Two hundred forty thousand square feet there.

Q What are your current taxes, please?

A Approximately seventy-four thousand dollars a year.

Q So, you believe that you, using your efforts, you can realize a gross rent of approximately three hundred ten thousand dollars per annum?

A Gross rent.

Q One dollar per square foot plus seventy-four thousand dollars in taxes makes three hundred ten thousand dollars?

A When I said "net," I said that the tenant would have to pay for insurance, maintenance - -

THE REFEREE: Taxes?

THE WITNESS: Yes.

THE REFEREE: That must be a good piece of property?

THE WITNESS: I think it's pretty good.

THE REFEREE: A dollar a foot net? Plus the obligation to pay the taxes, which is roughly twenty-five cents or thirty cents a foot?

THE WITNESS: And others.

MR. SANDLER: I believe that is more money than the debtor was realizing.

THE WITNESS: Well, I think it's a good property at the moment.

THE REFEREE: And you should, you invested enough money for it, you didn't steal it.

THE WITNESS: I am not here to fight that.

THE REFEREE: Are you going to get to the question of breach or prove the question of value out of his mouth?

MR. SANDLER: I am going on value, Your Honor.

THE REFEREE: Theoretically, that wasn't raised on direct. Maybe we can expedite the whole trial for Mr. Rosen and you.

Q Mr. Kaplan, you testified there were rent defaults going back to 1970, is that correct?

A Yes.

Q However, there are no 1970 rents in default at the present time, are there?

A No, sir.

Q They were all paid and accepted by you?

A Yes. The same thing happened when there were defaults in 1971.

Q Were those defaults with regard to rent as well as taxes?

A Everything was paid up.

Q There were defaults with respect to rent and taxes and mortgage payments?

A Yes.

Q All those defaults in prior years were cured?

THE REFEREE: How much do they owe you on that now?

THE WITNESS: They owe now September, October, and November of 1973.

THE REFEREE: How much is that?

THE WITNESS: About twenty-three thousand dollars a month for three months.

THE REFEREE: That includes taxes?

THE WITNESS: That includes taxes.

MR. ROSEN: I can correct that, it's two months, October and November and the other correction is no one testified as to mortgage defaults. He made the payments on time; it was not Overmyer's obligation to pay the

mortgage.

MR. SANDLER: The mortgage payment is figured into the rent.

MR. ROSEN: No, it is not, Mr. Sandler.

THE REFEREE: Overmyer is not responsible for mortgage payments?

MR. ROSEN: The landlord is responsible and has made them.

THE REFEREE: The point is this is a rather small indebtedness?

MR. ROSEN: No, no. It's relative, perhaps.

THE REFEREE: About forty thousand dollars, forty-five thousand dollars?

MR. ROSEN: The outstanding default at this point is two month's rent of approximately forty-six thousand dollars plus some charges. But, there is deferred maintenance and repairs that are required.

THE REFEREE: At ninety thousand dollars.

THE WITNESS: Plus January's rent, Your Honor.

THE REFEREE: January's rent we hope will come to you from the receiver.

Q Mr. Kaplan, what is the annual rent to be paid to you during the first twenty-year term of the lease, the initial twenty-year term of the lease?

A The rent that I just told you but I will repeat it to you. Nineteen thousand six hundred fifty-six dollars per year for the first twenty years.

Q The renewal term of ten years each, if you will turn the page, sir - - What is the rent per annum?

MR. ROSEN: I think the lease speaks for itself.

Q Do you have it there?

A One hundred forty-nine thousand dollars - - one hundred forty-nine th ousand seven hundred forty-nine dollars.

Q So that after twenty years the rent will actually reduce, is that correct?

A That is correct.

Q That's the deal you negotiated?

A That is correct.

Q What formula did you agree to have after waiting twenty years with no increase?

A The first twenty years of my mortgage would be paid off and then in - - I would then be able to get this rent without having the mortgage indebtedness. He wanted that and it was okay with me.

Q When you computed the rent for the first twenty years of one hundred ninety-nine thousand dollars a year, when you negotiated that rental, wasn't the amount that you had to pay the mortgage for interest and amortization figures into this one hundred ninety-nine thousand dollars to give you enough to pay the mortgage as well as have something for a return on your investment?

A It might have been.

Q You have no recollection of that and how you set the rental, as to what rental you received?

MR. ROSEN: He testified to that. It's repetitive at the moment and the lease speaks for itself. Put your own witness on.

THE REFEREE: What is the difference, he made his deal?

THE WITNESS: We were negotiating and that's what we negotiated.

THE REFEREE: One hundred ninety-nine thousand dollars for the first twenty years?

THE WITNESS: Yes.

THE REFEREE: How much do you pay on your mortgage?

THE WITNESS: Roughly eleven thousand six hundred dollars a month on my mortgage.

Q That's a constant payment?

A Mortgage payments are eleven thousand six hundred thirty-eight dollars a month.

THE REFEREE: Is there anything else here?

Q What is the interest rate on the mortgage that you are referring to?

A My best recollection is that it's ten percent interest and the rest is amortization.

Q Do you consider that as a real estate man, a desirable mortgage, as a steady seven percent interest rate?

A Today it is. It wasn't when I bought it.

Q That mortgage was in position when you

took title to the property, is that correct?

A That is correct.

Q Did you personally assume that the entity buying the property, personally assuming that mortgage, took it subject to the mortgage - -

MR. STERN: It's a legalism.

THE REFEREE: He took it subject to it.

MR. STERN: There was no personal obligation on his part.

Q In view of the fact you took it subject to it, and I assume you did not have a direct contract with the bank, I would like to ask you a question about the origin of this letter from the Provident Bank to you setting up an escrow for taxes, okay?

A Yes, sir.

Q That letter was written by Mr. Cummerford (phonetics), the assistant vice-president of the bank. Do you know Mr. Cummerford?

A I met him.

Q Did you speak to him before he wrote you this letter or did this letter just come to you in the mail?

A I spoke to him several times; I said, "I am sick and tired of doing business with Mr. Kirby who never lives up to a promise, sick and tired of it; they never pay their taxes and I am not going to do business with them anymore."

I had plenty of talk with them. He insulted me, called me names, said I couldn't foreclose. I said, "I am through with them and unless you pay directly, I am going to foreclose the mortgage."

Q At that time was there a modification of the mortgage to provide for a tax escrow agreement?

A It's in the lease. There was no other agreement drawn. They insisted upon it because they couldn't get the taxes paid on time.

Q Was there a modification of the mortgage to provide for a tax escrow, the mortgage between Overmyer and the Provident Institution?

A Something new drawn up?

Q Any modification.

A No.

MR. SANDLER: No further questions.

CROSS-EXAMINATION BY MR. BLUM:

Q Sir, the rental market in the Framingham area, are you familiar with the market at this

time for space comparable?

A It's pretty good.

Q It's close to two dollars a square foot, isn't it?

A No.

Q How close to it would it be?

MR. ROSEN: I object to this line of questioning. It was not done on direct. They expanded on an opening.

THE REFEREE: Maybe we will shorten their case. They have not done anything on breach.

A On a gross basis I would say it's close to one dollar and forty cents a square foot.

THE REFEREE: That is what we figured one dollar forty cents plus taxes of thirty cents.

Is it still a good market in that area?

THE WITNESS: Yes, it is, Your Honor, you could get it for a good building in good condition. I think you could get a tenant.

Q Did you inspect the building personally to come up with that ninety-three thousand dollar

estimate of expenses to put the building in good shape?

A Yes, I did.

Q Was that done in writing by you?

A No.

Q Did you make a list?

A I didn't prepare for that.

Q Let's go down the list of the ninety-three thousand dollars which you testified had to be expended.

How much of that was required for exterior painting?

A I have some notes on that.

Q You do have some notes?

A For myself. I wrote it down. I was thinking you might ask.

Q I am.

A The outside would cost around twenty-five thousand dollars to do two hundred forty thousand square feet of cracks and painting and leaders, and so forth.

Q That's the whole building?

A Yes, sir.

Q In other words, the whole building needs repainting on the exterior?

A Very badly.

Q Two buildings?

A It's one building as far as I am concerned.

Q There is no part of that building in good repair?

A I can only answer you, you can't paint half a kitchen and leave the other half alone. It's the same with a building.

Q Of course there is no relationship of the ninety-three thousand dollars and one hundred thousand dollars differential in rent that we have been hearing about, is there?

You heard the statement made there is about a one hundred thousand dollar differential between the rent that was paid - - the rent that was being collected by Overmyer - - and what is being paid today to you?

A I heard some attorney say it. I don't believe a word of that.

Q You don't believe there is a differential?

A I don't know anything about that. I tried to get that information but I never could get it.

I am entitled to it.

Q How much for painting?

A I told you twenty-five thousand dollars, roughly.

THE REFEREE: How about painting the roof; does that include painting the roof?

THE WITNESS: It has nothing to do with the roof.

THE REFEREE: What's the matter with the roof?

THE WITNESS: He didn't ask me that.

THE REFEREE: I am asking you that.

THE WITNESS: The roof is in a very bad state of repair.

THE REFEREE: What does it need?

THE WITNESS: It's cracked, it has to be fixed up and the roof painted throughout and gutters repaired.

THE REFEREE: You gave me gutters on the first estimate.

THE WITNESS: From the rooftop it's different.

THE REFEREE: What does the roof run?

THE WITNESS: Thirty-six thousand

dollars.

THE REFEREE: What eventually will happen if it doesn't get repaired?

THE WITNESS: The whole property will get bad; the whole roof will go bad, and it's worth one hundred eighty-five thousand dollars.

THE REFEREE: How do you mean "go bad"?

THE WITNESS: It will leak, the sun, the snow, everything - - it's cracked. It's not to a leaking point yet but it's ready for it.

Q It's not at a leaking point now, is it?

A I didn't see any leaks.

THE REFEREE: If you owned this property, that is to say, if you were not involved in this and you had this property would you repair a roof in that condition now?

THE WITNESS: I wouldn't wait ten days, I would do it right away to save my property.

Q Well, tell me what kind of a roof is on there and when did you see it?

A I saw it in October of 1973.

Q Did you go out to the top of the roof?

A Yes.

Q Did you walk it?

A No.

Q Did you just take a look at two hundred forty thousand square feet and say it needs repair?

A No.

Q How did you decide that the whole roof needed repairs at this point?

A I walked on four different parts of it, not all of it. There is about twelve parts of it and it was all in the same condition. It was built at the same time.

Q Now, if you only had to repair the four parts that you saw, how much would it cost you?

A About half.

Q Half for four?

THE REFEREE: Come on, Mr. Blum, stop quibbling. He just testified he spot-checked four parts and assumed the other parts would be in the same condition.

MR. BLUM: That is not a good assump-

tion.

Q Is there a pipe drain on this roof to prevent leaks?

A I don't know what you mean.

Q A covering underneath the roof?

A The roof was cracked in many, many spots, cracked and ready to go bad unless it's fixed up.

THE REFEREE: So, we have about sixty thousand dollars now?

THE WITNESS: Yes.

THE REFEREE: What do we need the other thirty thousand dollars for?

THE WITNESS: Twenty thousand dollars for repairs of all the holes and depressions in the parking lot and resurfacing.

THE REFEREE: So much?

THE WITNESS: Yes.

THE REFEREE: Well - - the whole thing?

THE WITNESS: The whole thing needs resurfacing and they should be resurfaced every four years. Your own drive-way should be re-done every four years.

THE REFEREE: It runs that much?

THE WITNESS: Twelve thousand dollars for the floors inside of the building.

THE REFEREE: What is wrong with that?

THE WITNESS: Painting of the building

Q What is the price per square foot for repairing this kind of lot?

A I don't know what the square foot is. This is a low price.

Q How do you know it's a low price if you don't know what the square-foot price is?

How do you know these facts that you are giving here?

A Through experience of the years, fifty years, of taking care of properties like this and owning properties like this, and doing jobs like this.

Q Do you live in the Boston-Framingham area?

A No.

Q Do you have any other property in the Boston-Framingham area, in which you have done repairs like that?

A The nearest to it is Connecticut and New Jersey.

Q So, you don't know what a low price in this area for this kind of work is?

A It would be higher here than anywhere else. The unions are all the same price.

Q Did you ever have this building appraised?

A No, I never did.

Q Do you know construction costs in this area?

A Yes, I do now.

Q If I were to put up a building of two hundred forty thousand square feet with all the attended circumstances of this improvement and landscaping, if there is any, and the drainage, how much a square foot would it cost me?

A To build an improvement today?

Q Yes.

A About nine dollars a square foot.

Q Are you familiar with land value costs in the Framingham area?

A I would make a guess and - - I haven't bought or sold any land in that area at all.

MR. ROSEN: I object. This witness has not testified to being a real estate

expert in the Boston area. It's just uncalled for.

THE REFEREE: Yes.

Q Would you say that the value of the property as a whole is at least equal to two and a half million dollars as it is presently constituted today if you had to replace it?

A Close to it, I would say.

Q Your price was approximately two million dollars how long ago?

A About two million one hundred thousand dollars six years ago.

Q Now, are you familiar with the interaction of leases and how they affect the ability to resell a piece of property?

A Somewhat, why?

Q If you have a lease on this property and you are limited in the rental you can collect from the tenant, would that inhibit the amount you could get on a sale of the fee position subject to that lease?

MR. ROSEN: Your Honor, may I just make a general statement? I think Your Honor went off going down the regular calendar to enable

these people to be able to be heard on direct-examination today.

What is happening is they are using this to prove their value.

MR. SANDLER: Your Honor, could we get an answer to that question. That question was right on target, it goes right to the heart.

MR. ROSEN: Will you be bound by his answer?

THE REFEREE: Let me hear the question.

(At this time, the last question was read back by the reporter.)

THE REFEREE: Rephrase the question -- if your property were leasable, if leases were not on the property, would it make a difference?

If our lease, the Overmyer lease, was not on the property, could you sell that property off in excess of what you told us?

THE WITNESS: No, I don't think so.

Q You couldn't get a greater amount?

A I could get less. If I could get the

same rental, I would be happy.

THE REFEREE: Thank you, very much, sir.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

In the Matter
of

D. H. OVERMYER,

Debtor.

No. 73 B 1129

United States Court House
Foley Square, New York, N.Y.

January 23, 1974
3:30 o'clock p.m.

LANDLORD'S MOTION FOR POSSESSION - (CONTINUED) - KAPLAN-BOSTON 6 and 7 - WACHTELL, LIPTON, ROSEN & KATZ, ESQS.

Before:

HON. ROY BABITT,
Referee In Bankruptcy

BARRY W. RAYVID
Official Court Reporter
U.S. Courthouse (R. 230)
Foley Square, New York, N.Y. 10007

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MR. DANIEL H. OVERMYER,
President of the Debtor

- - - - -

PROCEEDINGS

MR. SANDLER: Your Honor, we have a stipulation on Boston 6 and 7. Mr. Kaplan previously testified in this proceeding.

It is stipulated that the receiver from its operations of this property presently earns nine thousand ninety-one dollars per month, or approximately one hundred thirteen thousand six hundred eighty dollars per annum, prior to insurance of one hundred fifty dollars per month, prior to routine maintenance of approximately two cents per square foot per annum, and prior to office overhead which would include the cost of re-leasing.

THE REFEREE: You people will tell me how many feet there are here?

MR. SANDLER: This is a double building.

THE REFEREE: You will give me a schedule?

MR. SANDLER: Boston 6 and 7 is like two buildings, two hundred forty thousand

feet. Mr. Guy is presently on the stand and we can ask - -

MR. GEWERTZ: We will stipulate as to those figures, again, if we get the schedule. I have no way of knowing whether this is right on the sub-tenant.

MR. SANDLER: My statement covers it.

MR. GEWERTZ: All I asked for is a schedule. I am willing to accept the schedule.

THE REFEREE: He is accepting your figures. Show it to him.

Is this the property where the testimony was ninety some odd thousand dollars to fix up?

MR. SANDLER: Yes.

THE REFEREE: Let me, before I get to that, ask you a general question. You figure two cents a foot. We have heard testimony that some properties need thirty-five hundred dollars, some need eighty-five hundred dollars, some need three thousand dollars, some need twenty-seven hundred dollars.

Up to what figure would you consider

falling within your average budget of two cents a foot repairs that you are called on to do?

THE WITNESS: Well, I would answer it this way, we program about six hundred thousand dollars to use on maintenance.

THE REFEREE: That's two cents a foot nation-wide?

THE WITNESS: That's about thirty million square feet. We then set priorities to the needs and one building could very well take in - - it could take ten thousand dollars out of that which would probably be fine.

THE REFEREE: And, we may save a lot on others?

THE WITNESS: May not put a penny into others.

THE REFEREE: The Ohio Equities people testified, as I understand it, to nine leaks and you testified about the doors and a few other things, running about eighty-five hundred dollars.

Wasn't that the testimony with the

parking lot?

The figure were for that, roughly eighty-five hundred dollars. Is that figure, assuming it costs ten thousand dollars to bring Ohio Equities property up to snuff, or whatever the building is, is that comprehended within that two cents?

THE WITNESS: That would be.

THE REFEREE: In the hopes that a couple of the other buildings will make it and we will have no problem?

THE WITNESS: The - - we would probably break-even in Columbus.

THE REFEREE: This will have to be taken care of and the other two are all right?

THE WITNESS: Could be.

THE REFEREE: I am going to leave you right to Mr. Gewertz' examination. Supposing one one building it should show or the tenant mony should show we need ninety thousand dollars, or ninety-two thousand dollars, from a roof that has busted. Assume the figure.

How does a massive job like that fall into your two cents a foot budget?

THE WITNESS: It doesn't to this extent. I would go out there - - in the first place, that high a figure for any building means we are replacing fifteen percent of our cost of the building.

THE REFEREE: Your experience has shown that?

THE WITNESS: I haven't done any job of that magnitude. We would then solicit bids. If fifteen thousand dollars is what it would take for, say, paving, we would get a paver, agree to give him ten thousand dollars and he takes a note for five thousand dollars over the next twelve months so we can save our cash. To that extent, in getting those repairs made, we budget additional money from next year's budget.

THE REFEREE: Your six hundred thousand dollars, that's all there is available for repairs, right, without owing or borrowing off next year's funds? Don't give me the painting program.

THE WITNESS: We could, if we have sold a building, or if we have a new lease

coming up, we might buy maintenance through our next lease agreement and, again, defer this cost.

CROSS-EXAMINATION BY MR. GEWERTZ:

Q The way you have things budgeted on an over-all basis, isn't it really true all you are doing is putting your finger in a hole here, there, and there, and deferring the routine maintenance on each of the properties because they have lesser problems?

A No. When I came to Overmyer, Mr. Crawford, the previous president of ODS, advised me quite thoroughly in his opinion we had not done, maybe, a very outstanding job in the last three or four years prior to this.

There was so much catching up to do, and he said that this program had been in affect for six months. Now, we spent an awful lot of money - -

Q What program were you referring to?

A A building facelift. And, we set priorities on the basis of new leases coming up, bad cities that we needed to upgrade. We set the whole system on priorities.

Three people in the company set

priorities for me to work from. Now, very well using good business judgment you have to build. If you have a building rented one hundred percent, and Columbus 1 and 2 were not, we put some of our two cents in the building.

MR. GEWERTZ: I understand my building is not rented.

THE REFEREE: Get to your ninety thousand dollar repair bill. I want this witness done.

MR. GEWERTZ: My testimony is in.

MR. SANDLER: I would like to rebut that.

Q How does this work out on the books of the debtor? If you had to spend ninety thousand dollars to repair, wouldn't it be averaged out over the year and thereby be changed into a per unit figure for each property?

A I don't even know of any cases that spend anywhere near that figure. We had as high as thirty thousand dollars in repairs that we have been able to work right through our system.

THE REFEREE: Through that budgetary system?

THE WITNESS: Absolutely.

Q Does each particular Overmyer property keep a record of the maintenance and repair work which was done for each particular year?

A They are reasonably good. There is a small problem because casual labor - - if we go into a market such as Houston and hire five people, these people are paid on a weekly or an hourly basis through that operating branch.

Now, say the branch has five buildings in Houston and I use five men for a week and work them between then between Houston 7, 8 and 9. I have found that that charge has been allocated over all the Houston operations so I can't say because they worked on 7, 8 and 9 that Houston 10 and 11, didn't get a pro-rated charge.

Q Suppose I want to in one instance find out how much was spent in Framingham in 1972 for maintenance and repairs. Is there any place I can go to in the debtor's books and records to find out that figure?

A I keep charts and approve all expenditures for sub-contracts, vendors, materials and supplies. I do not have a record for labor.

Q Then, the answer is you could not give me a figure, am I correct?

A It would take time and money to go to Boston, go to the office there, and find out how much cash or labor was devoted towards maintenance on Boston 7 and 6.

Q That figure is derivable?

A Absolutely but I don't know that it's in the best interest of creditors to spend four hundred dollars or five hundred dollars finding that figure. But, it could be done.

Q You haven't considered each property separately when you come to two cents a square foot; you haven't considered the peculiar problems with respect to the properties?

A Yes, it has pretty well be outlined. I can show you the twenty-two buildings repaired exclusively last year. That is not in that two cents.

Q Painting would be something extra, is that right?

THE REFEREE: All right, Mr. Gewertz. One more question. You were in Boston this week?

THE WITNESS: Yes.

THE REFEREE: What did you figure on the needs for those two buildings that there are from your experience, if you have such experience?

THE WITNESS: I think I made a critical inspection and took the parties that rent the building or operate the building with me on this inspection, and I will do the ninety-three thousand dollars for fifteen thousand dollars.

THE REFEREE: You can get the whole job done for fifteen thousand dollars?

THE WITNESS: Yes, and I can tell you exactly what I will do for that.

THE REFEREE: What are you going to do?

THE WITNESS: In building A, with me, accompanying me, was Joe Santagate who was working there since we opened the operation and, more or less, runs the public and assists in helping the other tenants that we have on a long-term basis.

He showed me through the entire building and the deficiencies were as follows:

the roof was at this time snow covered and completely wrecked. There was water all over the roof. It would be impossible to get up there. I know of no one that has been up there since last August, since we made the roof repairs, and nobody else was there.

MR. GEWERTZ: He hasn't been there all this time.

THE REFEREE: He knows of no one, that's what he said.

MR. SANDLER: Mr. Guy, if you wanted to go out on that roof, how would you have to get up there?

THE WITNESS: A forty foot ladder wouldn't take you up. You have to get on a ladder.

MR. SANDLER: A forty-foot ladder. The reason I asked that question was - -

THE REFEREE: I heard the testimony of the old guy who was fluttering around the roof. I heard it.

THE WITNESS: We found no roof leaks at all, but we found a wet area on the top

of the fire wall between Section 7A and 7B, and in the left front corner of Section 6A we found the flashing had been turned up by the wind, probably, and there was some wetting in that corner.

We found a freezer that needed to be removed in Section 7B, but Goodrich is responsible for doing all that work, keeping that entire section of the building up and cleaning the office. Nothing of that is a cost to Overmyer.

In Section 7C the islands externally had debris all over them. It would take four or five truckloads to haul all that debris away. And, the drainage ditch along the entire building, Number 7, should be regraded with a grader at a later time, when it's dry enough to do it.

In this particular building two out of the three sections are heated and all heaters were working. There are heaters in Section 7A and Section 7B. Now, in building 6, door number 7 is locked up and it's broken. There would be repairs needed there. Both

buildings need entire gutters and downspouts replaced. You are talking about thirty-five hundred dollars a building.

In Section 6B the twenty-six foot double doors, number 13 and number 14, need repairs, need one panel replaced and the runners fixed. There was no evidence of any cracks in the brickwork; the fire wall looked good; the parapet looked good.

The exterior in the front of building 6 had been graded and replaced and shrubbery put in last year. Building number 7 could use, maybe, some landscaping in the spring.

Structurally I found that the buildings from a roof and floor standpoint were better than our average buildings. The one thing I left out of here is on the front of the two buildings we should paint them where the gutters have stained, the rust has stained the old building.

THE REFEREE: That doesn't necessarily make a bad building?

THE WITNESS: Our practice is that if we replace a gutter we would normally follow

up with a paint job.

THE REFEREE: Do you have anything more with respect of the testimony by the plaintiff last time?

DIRECT-EXAMINATION BY MR. SANDLER:

Q Did you testify as to how you arrived at the fifteen thousand dollar estimated cost of repairs?

A I took the number of square feet and charged nine and a half cents a square foot. And, our average - -

THE REFEREE: You included the drainage, the doors, and the gutters, which is about half the bill?

Q When you were in the warehouse during this rain, did you see any leaks?

A No. I mentioned the wet area on the fire wall.

Q That's not a leak in five or six spots?

A There was no water at all or any water leaks.

MR. GEWERTZ: There was no testimony as to any leaks.

MR. SANDLER: Your client testified that the whole roof had to be replaced.

MR. GEWERTZ: He said it's cracked but not quite at the point where it leaked.

A Okay.

THE REFEREE: Do you plan to cross-examine?

MR. GEWERTZ: Yes.

CROSS-EXAMINATION BY MR. GEWERTZ:

Q Mr. Guy, you concede that some exterior painting is necessary, is that correct?

A Yes.

Q What part of the building needs exterior painting?

A The sides with the gutters which is both truck door sides of the two buildings.

Q What percentage of the entire area?

A It's about thirty percent.

Q What would it cost to repaint the entire building?

A The entire building?

Q Exterior?

A Using the painters that we use primarily in Hartford, the highest price building today he

did for us was Buffalo, and that was seventy-four hundred dollars.

Q There are two buildings here?

A Use that figure and multiply by two.

Q Are these buildings as big as Buffalo?

A A little smaller.

Q If the entire two buildings had to be repainted, on the exterior, your figure is approximately fifteen thousand dollars?

A There is no need to do it.

Q I am asking you first - -

THE REFEREE: Why don't you ask what it would cost to build over? We are trying to move the trials along. You are asking what it would cost to do and he is testifying we don't have to do it.

MR. GEWERTZ: My client testified this entire building had to be repainted.

THE REFEREE: If everybody is trying to impede your client - - your client thought it was ninety thousand dollars. My wife thinks my whole house needs a paint job and yet I can't see it.

MR. GEWERTZ: My client testified he

was up there and there were problems with the paint.

THE REFEREE: This man said he - -

MR. GEWERTZ: He doesn't say.

THE REFEREE: I think everybody in this court has lost sight of what it is really all about. You are worried will I believe your man about the ninety-three thousand dollars; they are worried that he is lying by too much.

He may be an asthetic and may want to paint that place every week.

MR. GEWERTZ: You are not going to get my man and him to testify to the same thing.

THE REFEREE: Do you need the practice?

MR. GEWERTZ: I am trying to get them in substantial agreement.

THE REFEREE: He doesn't think it needs a painting.

MR. GEWERTZ: He testified it did.

THE WITNESS: I did not.

THE REFEREE: If it did, it would cost fourteen thousand eight hundred dollars.

MR. GEWERTZ: He said part of it needs

to be done.

THE WITNESS: Not fourteen thousand eight hundred dollars worth.

THE REFEREE: If that's the way you examine, that's the way. I want this case done. If you want to practice cross-examination do it in another courtroom at another hour.

Q You say the roof was covered with snow?

A Yes.

THE REFEREE: How much would it cost to paint when it does need painting?

THE WITNESS: Thirty percent of fourteen thousand dollars.

THE REFEREE: Now we are talking about eleven thousand dollars between the gutters, leaders and paint job?

THE WITNESS: That is correct.

Q Would it be okay to paint a third of the building without painting the rest?

A We do that normally.

Q Does that present a satisfactory appearance?

THE REFEREE: If a truck backed into

one wall and scratched one wall, would you want him to paint the whole thing?

MR. GEWERTZ: He is talking about thirty percent.

THE REFEREE: I wouldn't let him paint it in these proceedings, I will tell you right now. Under the egis of this Court, if it needs thirty percent painting, that's what it gets.

MR. GEWERTZ: We are all aware of the demands for keeping costs down in bankruptcy proceedings.

Q You were on the roof, you said, and it was covered with snow?

A I was not on the roof. Nobody could have gotten on the roof.

Q You didn't inspect the roof?

A Not at all.

THE REFEREE: Is it possible that the roof under all the snow needs repairs but has not yet reached the point where it's leaking?

THE WITNESS: This roof is seven or eight years old.

THE REFEREE: Is it possible that that

roof needs work to prevent a big seam bust?

THE WITNESS: No.

THE REFEREE: If it did, would you do it at this stage?

THE WITNESS: No.

THE REFEREE: Would you wait until it's busted?

THE WITNESS: Probably.

THE REFEREE: He waits until it's busted.

Q You were not on the roof and couldn't have seen any cracks if they were there?

A No.

Q Did you inspect the parking lot?

A You could not inspect the parking lot.

Q It was covered with snow?

A Yes. We repaved that not too long ago.

THE REFEREE: Like the city repaves potholes or do you repave it?

THE WITNESS: We usually don't put that much into it.

Q You testified there were some problems with the interior. How much would be allocable to the interior?

A In one section of the building it would take the best part of one thousand dollars or fifteen hundred dollars to fix Section 6C, the floor.

Q That's all?

A Yes.

Q Is there anything else wrong with the building?

A No. The other problems I saw with the building were an expense to the Goodrich firm.

THE REFEREE: What about the drainage? You told me about drainage around the building. How much?

THE WITNESS: A grader, two days, six hundred dollars.

THE REFEREE: For a proper drainage job?

THE WITNESS: It's all graded but the trucks pull out - -

THE REFEREE: What about those spots, how do we get rid of them?

THE WITNESS: What spots?

THE REFEREE: You told me damp spots on a fire wall, didn't you?

THE WITNESS: Yes. That would take a

man with some roofing cement to go up there and find out where the water is coming in.

THE REFEREE: There are areas in the roof where water is coming in?

THE WITNESS: It's near the top of the roof.

THE REFEREE: In other words, you are seeing a wet wall but no water coming through?

THE WITNESS: We have an expansion joint.

Q Do you know how much was spent by Overmyer for repairs and maintenance in Massachusettes in 1973?

A No.

Q 1972?

A No.

Q Do you know whether it was more than eighteen hundred dollars?

A No, I would not know that.

Q Was it more than twenty-four hundred dollars? Do you think that more than twenty-four hundred dollars per year is required on the property, based on your inspection?

A I think we have a couple of outstanding

debts that will well exceed that figure, bills we owe. I am not sure when the work was done.

Q Is a part of that from normal maintenance work?

A First you have to put this thing in the shape it should be in.

MR. GEWERTZ: No further questions.

MR. SANDLER: No further questions.

THE REFEREE: Any other stipulations, Mr. Gewertz, on any properties?

MR. SANDLER: Your Honor, this is Boston 6 and 7 which we are just concluding.

I have to ask Mr. Flanagan two questions. It has nothing to do with the rents, Your Honor.

THE REFEREE: You are calling him now for another purpose just in this case?

MR. SANDLER: Just in this case. It's unique to this case. He has only testified in one area so far.

THE REFEREE: Mr. Flanagan, please take the stand.

SAMUEL H. FLANAGAN, having been previously duly sworn by Honorable Roy, was examined and testified further as follows:

THE REFEREE: You are still under oath, Mr. Flanagan.

DIRECT-EXAMINATION BY MR. SANDLER:

Q Mr. Flanagan, did you receive a telephone call yesterday with respect to an offer to purchase the leasehold on Boston 6 and 7?

A Yes.

Q Who was that telephone call from?

A Paul Erickson.

Q Did you initiate that telephone call?

THE REFEREE: Who is he?

MR. GEWERTZ: I object. I think we have excluded previous offers. I thought he was talking about my client making an admission.

MR. SANDLER: This is the only way -- the landlord offered one hundred thousand dollars. Yet, we had an unsolicited offer for substantially more. It goes to the essence of what we are trying to do.

Q Who is Mr. Erickson?

A He is a former branch manager in Boston.

Q What did he offer you in that phone conversation, the first phone conversation?

A He said he would be interested in purchasing the leasehold on the property and he was prepared to pay two hundred thousand dollars at this point in time.

Q Did you relay that offer to me?

A Yes.

Q Did I ask you to communicate with him to see if he would increase the offer?

A Yes.

Q Did you then call him and ask if he would increase the offer?

A Yes.

Q Did he increase the offer?

A Yes.

Q What did he increase it to?

A Two hundred seventy-five thousand dollars.

MR. SANDLER: I have no further questions. We can get more; we can get three

hundred fifty thousand dollars.

CROSS-EXAMINATION BY MR. GEWERTZ:

Q Who is Mr. Erickson? Do you know him?

A Yes.

Q How long have you known him?

A About a year.

Q What is his relation to the Overmyer Company?

A Today, it's none.

Q What was it?

A He was for a period of about a year, the general manager of the Boston branch.

Q Is he doing any work for Overmyer not as an employee now, as an independent contractor?

A No.

Q Performing services for Overmyer or the receiver?

A No. He purchased the public warehouse business. It happened to be located in Boston 6 and 7.

MR. GEWERTZ: I would move to strike all this. This is hearsay testimony on this unless he gets Mr. Erickson up here and puts him on the stand and he testifies that

amount - - he is willing to pay that amount. This is a conversation between a third party and this witness. It's certainly not an admission of my client; I don't think it should be binding upon my client; I don't see any writing, it's a hearsay conversation here.

THE REFEREE: We don't even know if it was Mr. Erickson.

MR. GEWERTZ: That's right.

THE REFEREE: I will strike that testimony.

MR. SANDLER: If that testimony is going to be stricken I would like to call another witness who can testify to a personal conversation with his client.

THE REFEREE: Is the witness here?

MR. SANDLER: Yes.

Mr. Hayes?

GEORGE HAYES, having been duly sworn by Honorable Roy Baibtt, was examined and testified as follows:

THE REFEREE: Please give your full

name and address to the reporter.

THE WITNESS: George Hayes, 34 Daffodil Road, Stamford, Connecticut.

DIRECT-EXAMINATION BY MR. SANDLER:

Q Mr. Hayes, were you formerly employed by the debtor?

A Yes.

Q While you were employed by the debtor, did you have a conversation with Mr. Lowell Kaplan?

A On many occasions over a number of years.

Q Was there a conversation with Mr. Kaplan in which he offered to purchase the lease owned on Boston 6 and 7?

A There were two promises made to me by Mr. Kaplan, one about two and a half or three years ago - -

THE REFEREE: Now he made his own offer in court. He told us he offered one hundred thousand dollars.

MR. SANDLER: We don't think he was telling the truth.

THE REFEREE: What has happened in the last two months?

THE WITNESS: In the last two months he offered to pay us two hundred thousand dollars apiece.

Q Four hundred thousand dollars for the package?

A Yes.

THE REFEREE: Is that for the double warehouse? Is that for the warehouse in Boston?

THE WITNESS: Yes.

Q Two hundred thousand dollars each?

A Two hundred thousand dollars for Boston 6 and 7 and two hundred thousand dollars for New Orleans 6.

Q He offered two hundred thousand dollars for Boston 6 and 7?

A Yes.

CROSS-EXAMINATION BY MR. GEWERTZ:

Q Did he say why he wanted to do it?

A He is rather active in real estate investments; he has an interest in a trucking company - - I believe it's Pittston Company. I believe he thought he could step into it himself.

Q Did he say he was fed up with Overmyer,

wanted to get rid of them, would pay one hundred thousand dollars, or so, to get out?

A He was unhappy with everything, being called in Florida where he was resorting in the winter to be bothered with a check problem.

Q In other words, he complained to you he had problems with Overmyer's conduct on the whole - -

A He didn't say that - -

Q Or to the affect he had problems with Overmyer, he didn't want to be burdened with having Overmyer as a tenant - - did he say that?

A One of his motives, I would say, would probably be to make more money.

Q Did he say that to you, that he wanted to make more on this?

A I can't say he said that. He inferred that.

THE REFEREE: He wanted to get rid of Overmyer at any price, is that what you are saying?

MR. GEWERTZ: I am trying to get him to say it.

A I think it was a deal with him and the company he controlled.

Q I don't care what you think. What did he say to you?

THE REFEREE: Tell him what he wants here, he was contributing two hundred thousand dollars as charity because he hated Overmyer - - why don't you tell him that.

Q Did you make a memorandum of this conversation?

A No, sir, I did not.

Q Did you inform anyone else in the company of this?

A I ran in promptly to Mr. Overmyer.

Q Did you send a memo to Mr. Overmyer?

A No, I did not.

Q Didn't you keep any record?

A I didn't.

Q Could it have been one hundred thousand dollars?

A It was one hundred thousand dollars a year and a half ago.

Q What was it this time?

A Two hundred thousand dollars.

Q Maybe you think it was two hundred thousand dollars this time?

A I remember the conversation.

Q You couldn't have been mixed up?

A I don't remember any mix-up situation, sir.

Q You didn't keep a record?

A I don't recall. I didn't at the time make a memorandum.

Q You didn't keep a record?

A I don't recall. I didn't make a memorandum of this conversation.

MR. GEWERTZ: I have no further questions.

MR. SANDLER: That concludes Boston 6 and 7.

THE REFEREE: Decision reserved.

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16-H

B1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

In the Matter
of

D. H. OVERMYER COMPANY, INC.
(NEW YORK),

Debtor.

No. 73 B 1149

United States Court House
Foley Square, New York, N.Y.

February 12, 1974
10:00 o'clock a.m.

LANDLORD'S MOTION FOR POSSESSION (BUFFALO #2)
HAHN, HESSEN, MARGOLIS & RYAN

Before:

HON. ROY BABITT, Referee In Bankruptcy

BARRY W. RAYVID
Official Court Reporter
U.S. Courthouse (R. 230)
Foley Square, New York, N.Y. 10007

APPEARANCES:

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292 Madison Avenue
New York, New York

BY: EDGAR H. BOOTH, ESQ., Of Counsel
-and-
WILL B. SANDLER, ESQ., Of Counsel

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PROCEEDINGS

MR. ZIMMERMAN: Your Honor, for my affirmative case I want to put in the request for admissions.

THE REFEREE: You mean, the response which has been submitted to me for filing today?

MR. ZIMMERMAN: Yes.

THE REFEREE: Fine. I don't have your request but I am sure it's like the rest of them. Mr. Lifland will help us track down the original.

MR. ZIMMERMAN: On that basis, the applicant rests.

MR. SANDLER: Mr. Flanagan, please.

THE REFEREE: What about the stipulation of facts?

MR. SANDLER: It's in the admissions.

THE REFEREE: Is there anything else to try?

MR. SANDLER: Mr. Flanagan's testimony unless we can stipulate it.

MR. ZIMMERMAN: Mr. Flanagan's testimony.

S A M U E L H. F L A N A G A N, having been duly sworn by Honorable Roy Babitt, was examined and testified as follows:

THE REFEREE: Please give your full name and home address to the reporter.

THE WITNESS: Samuel H. Flanagan, 2

Chester Road, Darien, Connecticut.

DIRECT-EXAMINATION BY MR. SANDLER:

MR. SANDLER: Counsel agrees to stipulate that Mr. Flanagan is employed by the receiver with regard to collections and previously was employed by the debtor in the same capacity.

MR. ZIMMERMAN: So stipulated.

Q Mr. Flanagan, does the receiver keep records in the ordinary course of business indicating collections from sub-tenants at the Buffalo Number 2 premises?

A Yes.

Q Do you have copies of those records with you?

A Yes.

Q What do the records indicate the receiver presently collects from the sub-tenants of these premises?

A Sixteen thousand dollars a month.

Q What do the records indicate is paid to the landlord for rent and taxes under the lease?

A Rent is ninety-four hundred fifty-six dollars and taxes are one thousand two hundred twenty

dollars. That comes out to fifty-one thousand two hundred four dollars a year.

Q Are you familiar with the rental market in the Buffalo area?

A Yes.

Q How would you characterize that market for warehouse space?

A It's a good market.

Q How many sub-tenants are in this building?

A One.

Q What is the name of that sub-tenant?

A Fisher Price Division of Quaker Oats.

Q When does this lease expire?

A The lease expires April 30th.

Q Have there been negotiations with that sub-tenant with a view towards renewing the sub-lease?

A Yes.

Q Has a new sub-lease been drafted and submitted to them?

A Yes, a modified agreement has been worked out with them and it's in their hands for execution at this time.

MR. SANDLER: No further questions.

CROSS-EXAMINATION BY MR. ZIMMERMAN:

Q Mr. Flanagan, have you seen this proposed sub-lease?

A Yes, sir.

Q Did you help negotiate it?

A I have reviewed it. I didn't participate in any negotiations with Fisher Price.

Q Mr. Flanagan, what records does Overmyer keep with regard to leases?

A He retains basically the files that were formerly maintained by the Overmyer company which consists of the lease documents and in a good many instances, correspondence that pertain to the property.

Q Are you the custodian of these records?

A No, I would not classify myself as a custodian of the records.

MR. ZIMMERMAN: Your Honor, I move that the witness' testimony regarding the information found on the records of the receiver in D. H. Overmyer be stricken as hearsay. An appropriate foundation has not been laid for the business records - -

THE REFEREE: Overruled.

MR. ZIMMERMAN: Exception noted.

THE REFEREE: Yes. Go ahead.

MR. ZIMMERMAN: No further questions.

RE-DIRECT-EXAMINATION BY MR. SANDLER:

Q Mr. Flanagan, did you consult certain records in response to questions put to you?

A Yes.

Q Are those records maintained by the receiver in the ordinary course of business?

A Yes.

Q Were they previously maintained by the debtor in the ordinary course of business?

A Yes.

MR. SANDLER: No further questions.

MR. ZIMMERMAN: No further questions.

MR. SANDLER: Mr. Guy?

With regard to Mr. Guy, counsel has agreed to stipulate Mr. Guy is employed by the receiver, is an expert witness, an engineer, and incharge of maintenance of the Overmyer warehouses.

M U R R A Y G U Y, having been duly sworn by Honorable Roy Babitt, was examined and testified as follows:

THE REFEREE: Please give your full name and home address to the reporter.

THE WITNESS: Murray Guy, 74 Briar Brae Road, Stamford, Connecticut.

DIRECT-EXAMINATION BY MR. SANDLER:

Q Mr. Guy, you previously testified that on an average - -

MR. ZIMMERMAN: Your Honor, I object to the fact of the previous testimony.

MR. SANDLER: I was trying to save time.

THE REFEREE: Nothing that he testified to in another trial with other counsel is binding.

MR. SANDLER: Fine.

Q Mr. Guy, in connection with your duties, have you been able to strike an average cost of routine maintenance for the various Overmyer warehouses including Buffalo Number 2?

A Yes, I have.

Q Would you tell us what that average cost for routine maintenance is?

MR. ZIMMERMAN: Objection as to relevancy, on this particular property.

THE REFEREE: What is that?

MR. ZIMMERMAN: On what the average cost would be.

THE REFEREE: Overruled.

A Two cents per square foot is our budget for routine re-occurring maintenance.

THE REFEREE: Don't you see the relevancy, Mr. Zimmerman? It is to find out the spread between the rent reserved for your client and the rent to be received by the subs.

MR. ZIMMERMAN: Your Honor has previously limited my cross-examination to expenses incurred with regard to the specific properties.

THE REFEREE: Nonetheless, there is an allocability and, as you also know - - if I didn't mention it before, I will mention it again - - that at some point in the next few days the receiver is going to testify, or his accountant, as to how much of the over-all administration expenses of this empire is to be attributed to this property.

That will further reduce the spread of the figures Mr. Flanagan testified to. No landlord can possibly be hurt by any figure

that reduces the spread.

MR. ZIMMERMAN: It would be my position that the maintenance cost more than two cents per square foot.

THE REFEREE: You can get to it. The point of the matter is he has thus far testified uniformly as a general proposition this empire attributes a rough national budget of two cents per foot for each of the thirty million, or so, square feet, it operates.

You will cross-examine. I can't see any landlord objecting to any diminution of the gross figure Mr. Flanagan testified to.

MR. ZIMMERMAN: We are merely making a record with regard to my objection. There has been no testimony in any of these proceedings as to what specific expenses have been incurred.

THE REFEREE: We hope you will be able to do that.

THE WITNESS: I can do that now.

THE REFEREE: Listen to your attorney's questions.

Q Would you tell us, if you know, what

repair work has been done at Buffalo Number 2 over the course of the past year?

A We spent twenty-five thousand nine hundred dollars plus state tax on a new paving job which included putting in an entire new sub-base and rock. It was an abnormally expensive paving job in that site.

Q When was that job done?

A That job was concluded - - it was started on 7/15. I don't have the end date, but it had to be before the middle of August.

Q 1973?

A Yes, and the contractor was Pete Derkovitch.

Q At the present time, does Buffalo Number 2 require any additional repairs?

A As of last week we authorized four hundred fifty dollars in roof repairs on the office building. To my knowledge - - no, not to my knowledge - - but, Fisher Price indicated their contractor was going to do that last Friday.

I received this letter (indicating), and confirmation and quotations, and did authorize that repair.

Q That was a roof patch?

A It was a ledge around the flashing or ventilator of the air-conditioning unit.

Q To your knowledge, aside from the repair you just testified to, does the building require any additional work?

A I didn't finish the additional expenses we had last year.

We spent five hundred forty-nine dollars on new drainage work and we painted - - well, that wouldn't be significant. That's primarily it.

As far as additional work, I really do not know of any at this time but I have not inspected that building - - in fact, I have never seen that building. But, we did put a total of over thirty thousand dollars into that building last year.

THE REFEREE: How do you usually work when you don't inspect buildings nationwide, do you wait for complaints?

THE WITNESS: When I say "personally," I had a fellow like an area manager inspect the building.

THE REFEREE: Periodically this building has been inspected?

THE WITNESS: Yes, very much so. In fact, in September it was inspected by a fellow by the name of Gerry Paine.

MR. SANDLER: No further questions.

THE REFEREE: Mr. Zimmerman?

CROSS-EXAMINATION BY MR. ZIMMERMAN:

Q Do you know how old this building is, Mr. Guy?

A No. The only reason I don't know the age of the building is I didn't bring all of the records to court this morning as I usually do.

Q Has this building been painted on the exterior since it was built?

A No. We painted Buffalo Number 1. Our next building is Buffalo Number 2.

Q What do you anticipate is the expense of painting this building?

A I would say it would be an identical expense as Buffalo Number 1, which to the exact dollar was, I think, seventy-two hundred twenty dollars. That was last summer's price so it would be a little higher this year.

THE REFEREE: But, Buffalo was not painted?

THE WITNESS: Buffalo Number 1 was painted and Buffalo Number 2 was not painted. We did, however, get a contract price for Buffalo Number 2, and Albany Number 1 and Hartford Number 1 as a package deal.

We let the contracting to a Hartford organization but since then I have had to cancel it.

Q Did the new paving job's allocation come out of the general fund or was that an additional expense?

A We entered into an agreement on a note with the contractor paying him X percent down and the remaining balance over a twelve-month period.

Q Has this contractor been paid?

A I do not know. I know he has been paid a number of dollars, but I would be guessing.

THE REFEREE: Is his work finished?

THE WITNESS: Yes.

THE REFEREE: What is the difference to you whether he has been paid or not?

MR. ZIMMERMAN: There may be a lien on the building.

THE REFEREE: I see. Do you know of this?

THE WITNESS: I should know but I do not.

THE REFEREE: Pass on.

Q Do you retain any maintenance personnel in the Buffalo area?

A No.

Q What maintenance personnel do you use to make routine repairs to the Buffalo building?

A There is nobody but me anywhere right now.

Q Prior to the filing of the Chapter XI, did you have any maintenance personnel in the Buffalo area?

A We pretty much exclusively used the contractor I mentioned before, Pete Derkovitch, for all Overmyer work.

Q Was he paid on a per diem basis?

A No, individual contracts on all jobs.

Q Mr. Guy, what kind of records do you have with you regarding the maintenance expenses on this building going back in time?

A I have a complete folder of non-meaningful information. It shows what work we have done, and so on, but I would say I couldn't additionally - - I

could not give a total figure, I know the figure is not complete.

MR. ZIMMERMAN: No further questions, Your Honor.

MR. SANDLER: Thank you, Mr. Guy.

That concludes the receiver's case.

THE REFEREE: Thank you, Mr. Guy.

Decision reserved on Buffalo Number 2.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

In the Matter
of

D. H. OVERMYER COMPANY, INC.
(NEW JERSEY),

Debtor.

No. 73 B 1149

United States Court House
Foley Square, New York, N.Y.

April 11, 1974
9:00 o'clock a.m.

LANDLORD'S MOTION FOR POSSESSION (CAMDEN #2)
HAIN, HESSEN, MARGOLIS & RYAN

Before:

HON. ROY BABITT,
Referee In Bankruptcy

BARRY W. RAYVID
Official Court Reporter
U.S. Courthouse (R. 230)
Foley Square, New York, N.Y. 10007

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Attorneys for the Debtor
225 Broadway
New York, New York

BY: BERTRAM R. LIFLAND, ESQ., Of Counsel

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P R O C E E D I N G S

THE REFEREE: In Camden #2, I have an answer by both parties.

MR. ZIMMERMAN: Your Honor, I have some documents I want to put in evidence and a witness.

First, I want to offer a certified copy of docket entries in a case in the

Superior Court in New Jersey, Camden County, Number 8-29118-72, entitled Strauss, Greenberg & Company, Plaintiff, versus D. H. Overmyer Company, Inc.

MR. SANDLER: No objection to that, Your Honor.

(At this time, the said document was so marked Applicant's Exhibit "1" in evidence.)

MR. ZIMMERMAN: I would like to offer in evidence a judgment for possession in the same action, in the same court, which was filed in that court on October 4th, 1973.

MR. SANDLER: I object on the grounds of irrelevancy, Your Honor.

THE REFEREE: To what?

MR. SANDLER: This is a judgment of possession dated October 4th, 1973, and the objection is based on two grounds.

First, it's a judgment in response to a motion for partial summary judgment. The underlying papers indicating what type of judgment was sought are not before the Court. It might have been a motion for partial summary judgment for possession or to collect the

rents until the arrearages are liquidated. I don't know. It could have been a temporary situation.

Furthermore, subsequent to this judgment a stipulation was entered into between the parties in this same case and a copy of that subsequent stipulation is in - - it is annexed to the landlord's papers, and the stipulation says that the Overmyer Corporation keeps the lease and keeps possession provided it pays one hundred thirty-nine thousand dollars by a certain date.

So, the parties agreed to supersede this, whatever it is. Without the underlying papers, I don't know what this prior judgment is, but I do know it was superseded by a subsequent stipulation that Mr. Zimmerman put into the record.

MR. ZIMMERMAN: Your Honor is well aware that a court speaks through its orders and judgments and that the judgment speaks for itself. This is a certified copy of a judgment duly entered in a State Court.

THE REFEREE: What does that mean?

MR. ZIMMERMAN: This is admissible in evidence, Number 1. The relevance of the series of documents that I am prepared to put into evidence is that the landlord here commenced a proceeding to recover property - - possession of the property - - and damages under the lease and got judgment of possession, actually had a right of possession entered by the Court and executed, and went into possession; that after going into possession they entered into an agreement with the debtor under which the debtor agreed with the landlord that the lease would be terminated if the amount of the consent judgment was not paid by December 31st, 1973.

THE REFEREE: I will allow it for whatever it's worth, but you must understand it's for just a matter of future knowledge of a judgment. After all, unless it's absolutely clear on its face, you have to look at the underlying basis.

If I showed you a record of convictions and the question is whether or not the crime involved the moral terpitude law, could you

tell from the judgment? Wouldn't you have to look at the indictment?

MR. ZIMMERMAN: Except we are talking about a judgment for possession.

THE REFEREE: I will accept that provided the stipulation is deemed marked in evidence, as well.

(At this time, the said document was so marked Applicant's Exhibit "2" in evidence.)

MR. ZIMMERMAN: Now, I offer in the same case in New Jersey, a writ of possession with a sheriff's return on it indicating that the plaintiff was put into possession of the described premises. Any objection?

MR. SANDLER: I object to the exhibit and I object to your remarks. I think if it's admitted, it will speak for itself.

THE REFEREE: What is the objection, Mr. Sandler?

MR. SANDLER: Well, this again antedates, Your Honor - -

THE REFEREE: The stipulation?

MR. SANDLER: The stipulation.

THE REFEREE: The objection is over-

ruled for the same reasons as I overruled the objection to the order. I would assume that having brought these proceedings to recover possession, it seems clear to me neither this order nor writ were implemented or if they were implemented, they - - maybe they were subsequently changed.

MR. SANDLER: I think there should be a voir dire on these documents. According to the docket sheet that the landlord has, we have the judgment, the writ of possession, and then we have something called an order to restrain, and I would like to ask Mr. Zimmerman if he has a copy of the order to restrain and what actions the Court took on the order to restrain?

MR. ZIMMERMAN: I will put a witness on the stand.

THE REFEREE: I just don't think that is terribly important to these proceedings. I really don't know why Mr. Zimmerman is going through this.

The fact is you don't have possession, you did not have possession, you divested of

possession through a separate agreement.

MR. ZIMMERMAN: This is an action for possession.

THE REFEREE: That means the debtor had possession. You want possession. What is the difference? You altered the court in New Jersey by, in essence, refusing the implementation of it and giving back the debtor the premises on conditions.

MR. ZIMMERMAN: Your Honor, may I mark it in evidence?

MR. SANDLER: I would like to know if you have a copy of the order to restrain?

MR. SANDLER: I would like to question you on the order to restrain.

THE REFEREE: I will allow it. We will hold on marking that in evidence.

MR. ZIMMERMAN: What?

THE REFEREE: That portion of those entries. Why do we need the docket entries, Mr. Zimmerman; what does it add to your case here?

MR. ZIMMERMAN: Nothing but clarity, Your Honor.

THE REFEREE: I don't need clarity and I don't really think we should clutter the record with more testimony that is really irrelevant.

MR. ZIMMERMAN: I don't intend to clutter the record at all.

THE REFEREE: Do as you wish. When you get to your case, you will mark it in evidence and then if it's deemed a necessity.

What else?

MR. ZIMMERMAN: What just happened?

THE REFEREE: I sustained the objection for the moment.

MR. ZIMMERMAN: To what?

THE REFEREE: To that portion of the document that relates to the entry of a restraining order - -

MR. ZIMMERMAN: The writ of possession I assume is going into evidence?

THE REFEREE: The writ itself?

MR. ZIMMERMAN: That's correct, Your Honor.

THE REFEREE: I will overrule the objection on that. Mark that in evidence.

(At this time, the writ was marked Applicant's Exhibit "3" in evidence.)

MR. ZIMMERMAN: Now, I would offer in evidence that same action - - a consent judgment and stipulation which was filed on November 9th, 1973, a copy of which without the signatures, et cetera, is attached to the moving papers.

THE REFEREE: Mr. Sandler?

MR. SANDLER: I note, Your Honor, that the consent judgment is for money only. I have no objection.

THE REFEREE: Mark that as Exhibit "4".

(At this time, the said document was marked Applicant's Exhibit "4" in evidence.)

MR. ZIMMERMAN: I now call Mr. Leonard Buckie to the stand.

L E O N A R D B U C K I E, having been duly sworn by Honorable Roy Babitt, was examined and testified as follows:

THE REFEREE: Please give your full name and home address to the reporter.

THE WITNESS: Leonard J. Buckie, 304 Delancy Street, Philadelphia, Pennsylvania.

DIRECT-EXAMINATION BY MR. ZIMMERMAN:

Q Mr. Buckie, are you familiar with the lawsuit commenced in the Superior Court of New Jersey, Camden County, by Strauss, Greenberg & Company and Penn-Saul Holding Company against D. H. Overmyer Company, Inc.?

A Yes, sir, my firm filed that complaint through local counsel in New Jersey.

Q You are an attorney?

A That is correct.

The firm is Wolff, Block, Schorr & Solis-Cohen.

Q What was the nature of this action, sir?

A It's an action two-fold to recover

possession of the property and recover deficiencies in the payment of rent.

Q Was a motion for partial summary judgment made in that action?

A Yes, it was.

Q What did that motion seek to do?

A Well, the answer that had been filed by the defendant in the action, the Overmyer Company, had admitted by that thatthe rent had not been at the time paid. On that basis we moved for partial summary judgment for possession.

Q What was the result of your motion?

A After several continuances at Overmyer's request, the motion was ultimately granted.

Q Did that lead to the judgment marked in evidence marked as Applicant's Exhibit "2"?

A Yes, it did.

Q To your knowledge was a writ of possession subsequently issued?

A Yes, it was, and it was executed by the sheriff.

Q Is that Applicant's Exhibit "3" in evidence?

A That is correct.

Q To yourknowledge, did the landlord actually go into possession of these premises?

A Yes, we did, through an attorney in my office who actually took physical possession.

Q What happened subsequent to the landlord going into possession?

A Within twenty-four hours after we retained possession, house counsel for Overmyer contacted us and stated they wished to renegotiate to see whether or not they could remain in possession for a short period to phase out the operations.

They said it was a public warehouse, that we would cause inestimable damage to the people that had goods in there, that they needed to get them out. So, on that basis, we agreed to a stipulation which kept the writ of possession intact as far as we viewed it and also gave us the other part of the summary judgment, that is, the judgment for money.

Q So, according to - - you entered into the stipulation which is part of Applicant's Exhibit "4", is that correct?

A That is correct. I might say, Your Honor, for whatever else it has in relevance, we specifically discussed with Overmyer in negotiating

the stipulation and consent, the possibility there might be a bankruptcy proceeding because there were many arrears. We heard rumors they were in arrears everywhere.

We were apprised - - we were specifically advised there was no bankruptcy contemplated and as they viewed it, it would not violate our right to possession at the end of the year if they didn't pay it.

Q It was your understanding, as to the stipulation, if they didn't pay the amount of the consent judgment by December 31st, that the lease would be terminated and you would be entitled to immediate possession?

A That is correct.

Q Could you tell us why the December 31st date was selected?

A It was two-fold. At their request they said they would like about sixty days and, secondly, the writ of possession that was entered by the court in New Jersey contained an ultimate returnable date on January 7th of 1974, and we wanted to make sure that the date set forth in the stipulation was in advance of the date that the court had ruled

they should definitely be out of possession.

MR. ZIMMERMAN: No further questions, Your Honor.

THE REFEREE: But, the lease was still in affect then?

If they paid the one hundred something thousand dollars by the end of last year, it would be deemed their lease was still in affect?

THE WITNESS: Yes, sir, but that would have been a condition subsequent as I viewed it.

THE REFEREE: It would have been subsequent flowing from a condition preceding?

THE WITNESS: I think it's safe to say our view and both counsel's view who negotiated this stipulation and final judgment was that the possession being given up was the possession only through this document and not through the lease.

MR. LIFLAND: Judge, I will object to his characterization of the other counsel's views.

THE REFEREE: Supposing they paid you

the other one hundred seventy thousand dollars by the end of December and had not filed the proceeding?

THE WITNESS: Than I think we would have reverted to the lease as originally drafter.

THE REFEREE: Go ahead, Mr. Sandler.

CROSS-EXAMINATION BY MR. SANDLER:

Q Mr. Buckie, according to the copy of the docket entry of the New Jersey proceeding, after the judgment and the writ of possession there was an order to restrain docketed by the court on N ovember 8th.

Could you tell me what the order to restrain was?

A A petition was filed by the Overmyer Company through their counsel to restrain the sheriff from executing the writ. That was filed ex-parte without notice.

In fact, it was filed the day after the sheriff had already executed the write. Since it was ex-parte, it expired after five days and subsequently in the conference with the judge that signed the writ, he took the view it was moot because

it came too late.

Q Were you at the conference with that judge?

A Yes, sir.

Q What was the judge's name?

A I believe it was Judge Brown. I am not a member of the New Jersey Bar and that's why we went through local counsel.

Q Do you have a copy of the order to restrain?

A No, sir.

Q You didn't make that available to Mr. Zimmerman?

A I didn't do it intentionally. I didn't feel it was relevant.

Q The court docketed on November 26th two affidavits. Do you have copies of those affidavits?

A No, sir. Those affidavits were attached to the petition to restrain the sheriff. They were affidavits as executed by Overmyer officials.

Q Now, reading from the stipulation, you have a copy of it in front of you, paragraph 4 states "In the event that the defendant" - - that would be Overmyer - - "satisfies the judgment agreed to herein,

on or before December 31st then this lease agreement of April 12th, 1967 and supplement of lease of May 8th, 1972, between plaintiff and defendant, Overmyer of New Jersey, shall continue in full force and effect."

Can you tell me what your understanding is of that statement?

A Yes, sir. It's prefaced by "In the event that on the December 31st date that the arrearages are paid" - -

Q That's right.

A The purpose of it was to indicate as of January 1st, 1974, the lease would continue if the arrearages were paid.

Q It doesn't say that the lease would be reinstated?

A The word "reinstatement" is not in there.

Q It says the lease will continue?

A Yes, sir.

Q It indicates if the lease - - if the amount is not paid the lease will terminate, is that correct, Paragraph 3; "In the event that the defendant fails to satisfy judgment then the lease between Overmyer and the plaintiff shall be terminated?"

A That's correct.

MR. ZIMMERMAN: Judge, the witness' ability to read the stipulation is not particularly relevant.

MR. SANDLER: I am testing his understanding of it based on his prior testimony.

THE REFEREE: Overruled.

Q In Paragraph 5 of the stipulation it says "In partial satisfaction of the judgment stipulated herein, Overmyer (New Jersey) hereby assigns to plaintiff, all of its rights, title and interest in all accounts receivables," et cetera.

Did the landlord realize any monies by reason of this assignment of its accounts receivables?

A Yes, sir, I believe it did.

Q How much?

A I would be guessing. I think it was in the neighborhood of five thousand dollars.

Q Where would the records be as to what the landlord realized with regard to this assignment of accounts receivables?

MR. ZIMMERMAN: I object on the basis

of relevancy to the issues brought on by the application.

MR. SANDLER: What if one hundred thirty-nine thousand dollars was collected?

THE WITNESS: I know for a fact that it was not. I said approximately five thousand dollars.

THE REFEREE: Why don't you ask him what he knows of collections made? Was the full amount paid by December 31st?

THE WITNESS: Absolutely not, Your Honor, no.

THE REFEREE: Do you have any idea of what was paid?

THE WITNESS: Between five thousand dollars and seven thousand dollars. The exact figures would be known by the real estate agent.

THE REFEREE: When was the last payment received, if you know?

THE WITNESS: Could you refresh my recollection when the bankruptcy was filed here?

THE REFEREE: November 16th.

THE WITNESS: Then the last payment was received about November 1st. It was just about a week or two before, and that's about it.

MR. SANDLER: No further questions, Your Honor.

MR. LIFLAND: No questions.

MR. ZIMMERMAN: No further questions.

THE REFEREE: Thank you, sir.

Your next witness, Mr. Zimmerman?

MR. ZIMMERMAN: I have no further witnesses, Your Honor.

Your Honor, I would rest and I would like to make certain motions at this time and be very brief.

THE REFEREE: Okay.

MR. ZIMMERMAN: As Your Honor can tell from the testimony elicited based on the stipulation, the stipulation stated that the lease shall terminate unless the judgment was satisfied on December 31st, 1973.

This is a stipulation that was signed by Overmyer and the landlord.

THE REFEREE: There is no doubt it's

a contract with the same force and affect and the leases so provide for termination.

MR. ZIMMERMAN: Not quite, Your Honor, because under the terms of the lease as in all the other cases that have been before the Court, there was an option in the landlord to act unilaterally to terminate based upon certain events of defaults.

THE REFEREE: Yes.

MR. ZIMMERMAN: Accordingly, the third affirmative defense put forth by both the receiver and the debtor indicates the application is premature because the landlord has not given the proper notice or notices of termination.

THE REFEREE: In other words, what you are saying is this stipulation is self-executing?

MR. ZIMMERMAN: Exactly.

THE REFEREE: Unlike some of the leases here that require notice or some other action by the landlord this is self-executing?

MR. ZIMMERMAN: And, first of all, the third affirmative defense should be stricken.

THE REFEREE: All right.

Mr. Sandler, apparently, he does not rely on a termination clause in the lease, he is relying on a termination clause and agreement by which the lease was permitted to remain alive even after a judgment.

MR. SANDLER: I just want to ascertain that we did not receive an independent termination notice.

MR. ZIMMERMAN: Your Honor, I can state for the record that no termination notice was sent during the pendency of these proceedings.

MR. SANDLER: All right, then we will withdraw - -

MR. ZIMMERMAN: The third affirmative defense?

MR. SANDLER: Yes.

THE REFEREE: Stricken.

MR. ZIMMERMAN: Going to the first affirmative defense, which is the heart of the debtor's case, I would direct the Court to Paragraphs 8 and 10.

Paragraph 8 speaks of termiantion of the lease by the landlord and says "It will

cause irreparable harm and injury to the debtor."

Paragraph 10 says "That the Court may properly prevent termination of the lease by the landlord."

Your Honor, this defense is not applicable to the facts of this case. I therefore move it be stricken.

THE REFEREE: I will refuse. That motion is denied. There is nothing more nor less boiler plate that they put it in. Your fact pattern is a little different here. The gist of the defense is valid. The objection is overruled.

He is asking me for whatever reason not to decree termination, not to authorize termination, and even if there is termination the Bankruptcy Court should not enforce it because it's a forfeiture. Basically that's what he is saying. He has been saying it in every other case. What is the difference?

MR. ZIMMERMAN: Your Honor, this case is not the same as the other cases.

THE REFEREE: I understand it isn't,

I know it isn't. I am going to overrule your objection.

MR. ZIMMERMAN: I might also note that Paragraph 10 speaks solely by reason of the declaration by the landlord of a technical default under the Bankruptcy clause.

THE REFEREE: I am telling you they drew up boiler plates for seventy cases. Will you amend your answer, Mr. Sandler?

MR. SANDLER: Yes.

THE REFEREE: You are directed to amend your answer to conform to the pleadings and proof. Don't you see what happened, Mr. Zimmerman?

MR. ZIMMERMAN: I see exactly what happened.

THE REFEREE: They put in boiler plates because they were swamped with these applications.

MR. ZIMMERMAN: They weren't swamped with these applications at the time this was filed.

THE REFEREE: Do I have discretion to permit them to amend?

MR. ZIMMERMAN: Yes, sir.

THE REFEREE: And - - do you want me to deny that in the exercise of my discretion? You are directed, Mr. Sandler, to amend to conform the pleadings and proof to the proper concept of the defenses. Basically it's the same defense, Mr. Zimmerman. It throws it in my lap, anyway.

MR. ZIMMERMAN: I do not see it as the same defense having read their brief. They are relying upon cases.

THE REFEREE: They may have to write a special brief for you. To me, it's all the same thing, Mr. Zimmerman. If the Bankruptcy Court will not tolerate forfeiture of interest in debtors that are substantial, what is the difference if it doesn't enforce forefeiture because of a termination by stipulation or termination in the lease?

MR. ZIMMERMAN: May I reserve the right to again move or renew my motion at the end of their case?

THE REFEREE: Sure. You will amend your answer forthwith, Mr. Sandler.

SAMUEL H. FLANAGAN, having been duly sworn, by Honorable Roy Babitt, was examined and testified as follows:

THE REFEREE: Please give your full name and home address to the reporter.

THE WITNESS: Samuel H. Flanagan, 2 Chester Road, Darien, Connecticut.

DIRECT-EXAMINATION BY MR. SANDLER:

Q Mr. Flanagan, is the Camden #2 warehouse presently leased to a single tenant?

A Yes.

Q What is the name?

A Trans-State Distribution.

Q What is the term of the lease?

A The lease terms are 2/1/74 to 1/31/75.

Q What is the monthly rent payable to the debtor under thatlease?

A The lease is a net lease for thirteen thousand five hundred dollars per month.

Q What is the amount payable to the landlord for rent and taxes per month?

A Seventy-four hundred thirteen dollars

in rent and the tax escrow is two thousand eighty-three dollars, for a total of ninety-four hundred ninety-six dollars.

Q What is the differential per month?

A Four thousand four dollars per month or forty-eight thousand dollars per year. Unlike some of the other leases this is a net lease.

Q Would you explain what you mean by a "net lease"?

A It's net in surance and net maintenance. All of the insurance premiums that the receiver is required to pay are paid by Trans-State Distribution as additional rent, and any maintenance required to maintain the building in its condition as of the day of the lease would be borne by Trans-State Distribution.

MR. SANDLER: No further questions, Your Honor.

THE REFEREE: That's a very good lease and a very big problem.

CROSS-EXAMINATION BY MR. ZIMMERMAN:

Q Mr. Flanagan, is Trans-State in the - - is this a company formed by the former manager of the Overmyer warehouse?

A The former manager of the Overmyer

Company is one of the principals of Trans-State Distribution.

Q What is his name?

A John Rigg.

Q Does he have any other buildings?

A To my knowledge, no.

Q Do you know if there was any difficulty in it, during the course of this proceeding, in collecting any rentals from this tenant?

A It's my understanding that there are other than for the month of April, no outstanding rents.

THE REFEREE: You mean other than for this month?

THE WITNESS: Yes, sir.

THE REFEREE: Did you have any difficulties collecting the others? When did this lease start, did you say?

THE WITNESS: This lease with Trans-State started February 1st.

THE REFEREE: Who was the previous tenant?

THE WITNESS: I don't have the records here.

MR. LIFLAND: Judge, may I inform the Court this was the subject of a proceeding brought by the debtor for a turnover of funds from a previous entity which Mr. Rigg, the present tenant, was a partner and the two partners had a falling out ergo rent.

There was nothing being collected and then we brought on a motion. Since then, the debtor and receiver have received the rent.

THE REFEREE: How long, to your knowledge, has this entity and its predecessor been in possession?

THE WITNESS: It is my understanding that in December Rigg attempted to form a partnership with another individual or group of individuals and that they really couldn't get the deal consummated, so he had to abandon his pursuit in that and find another partner or someone with the capital, which was done prior to the first part of February - - the 1st of February - - and from February forward he has been operating in the manner that he is today.

Q Did you negotiate this sub-lease, Mr.

Flanagan?

A No, sir, I did not.

Q Who did?

A Mr. Byrnes.

Q Did you supervise him?

A Did I supervise Mr. Byrnes?

Q Yes.

A No, sir, I did not.

Q Are you aware of the financial condition of this sub-tenant?

A No, I am not.

Q Do the debtor's records indicate anything or do the receiver's records indicate anything about the capitalization or net worth of this sub-tenant?

A To my knowledge, no.

Q Had you reviewed those records prior to coming to court today?

A Not with regard to the net worth of the sub-tenant, no.

THE REFEREE: Is this about one dollar ten cents a foot?

THE WITNESS: No, it's one dollar thirty-five cents, I believe.

THE REFEREE: What are the comparables in that area of New Jersey?

THE WITNESS: It would run as high as one dollar sixty cents.

THE REFEREE: Do you know whether or not if this tenant were not in possession, there would be any inhibition for renting at roughly the same rental?

THE WITNESS: It would be my belief, Your Honor, that the building is in a good location and it would not be difficult to sub-lease to tenants other than Trans-State Distribution.

Q Was this a profitable building prior to the petition being filed?

A It was being operated as a public warehouse and having had the responsibility of the area for four years prior to the filing, the building was profitable, yes.

Q What is the explanation for the reason that no rent was paid to the landlord for over six months prior to the initiation of these proceedings?

A That is out of my area of knowledge and responsibility. I had no reason to delve into why

landlords were or were not being paid.

Q Do you have any estimate of what the net profit from this building will be under this lease?

A In the neighborhood of forty-eight thousand dollars per year.

Q Is that net or gross?

A That would be somewhere between as what has been defined here as between net and gross. The only cost that would need to be allocated or taken from this forty-eight thousand dollars would be the cost of maintaining the office here in New York.

THE REFEREE: Its proportionate share?

THE WITNESS: Yes, sir.

MR. ZIMMERMAN: We will have testimony on that, I assume?

MR. SANDLER: On the 18th.

Q Are you aware of how much money will have to be paid to this landlord in order to cure the arrears on this building?

MR. SANDLER: Objection.

A No, I am not.

THE REFEREE: Overruled. Do you know how much is owed to the landlord as of the

date of the filing of the petition?

THE WITNESS: No, sir.

THE REFEREE: I would like to hear something as to that.

MR. ZIMMERMAN: There is a judgment.

THE REFEREE: That's one hundred seventy thousand dollars?

MR. SANDLER: One hundred thirty-nine thousand dollars.

MR. ZIMMERMAN: One hundred thirty-seven thousand dollars in November.

THE REFEREE: Incidentally, I think, maybe, that's one thing we have not fully developed, but there will probably be very little dispute on it. At some point in the briefs, I will want to know the amounts of the arrearages.

As I have told you many times, Mr. Sandler, the Judd case no matter what the Court of Appeals does, is vastly distinct as between a one-month default or the amount that was tendered. I think it's important if I know if not the exact dollar amount, what the approximate arrearages are with all of these.

Q Assuming, as I believe the record indicates, that the arrearages on this building are in excess of or approximately one hundred fifty thousand dollars, how long will it take before this building is profitable to the receiver, assuming that these arrearages are going to have to be paid on confirmation?

A You are asking me questions that I have really given no great thought to.

THE REFEREE: Supposing this were a single entity, supposing we have one case before us, Overmyer of New Jersey, owning one warehouse and on these figures that it owes one hundred something thousand dollars.

If it were to operate with this tenant under the present lease drawn with them, do you have any idea how long it could safely be said that this building would turn a profit?

THE WITNESS: Somewhere in the neighborhood of three years.

THE REFEREE: In other words, if all the excess would go to the arrearages, it would be three years before it was turned around?

THE WITNESS: Yes, sir.

THE REFEREE: It is a matter of arithme-

tic even for me, Mr. Zimmerman.

Q Do you know if the receiver is paying interest on any loan made to it by the First National Bank of Boston?

A No, I do not.

THE REFEREE: I really don't think that is too relevant, Mr. Zimmerman.

MR. ZIMMERMAN: I guess the Court can take judicial notice of what the prime rate for lending money is at this time and that the debtor is going to have to get one hundred fifty thousand dollars in order to confirm the presently proposed arrangement.

THE REFEREE: And that the Dodgers are in first place.

Is there anything else?

MR. SANDLER: I move to strike Mr. Zimmerman's remarks.

THE REFEREE: Overruled.

MR. ZIMMERMAN: No further questions.

THE REFEREE: Thank you, Mr. Flanagan.

Do you have anything else?

MR. SANDLER: Your Honor, in view of the fact this is a net lease - -

THE REFEREE: I was not satisfied. Supposing a tornado blew that roof off?

MR. SANDLER: I call Mr. Guy.

M U R R A Y G U Y, having been duly sworn by Honorable Roy Babitt, was examined and testified as follows:

THE REFEREE: Please give your full name and home address to the reporter.

THE WITNESS: Murray J. Guy, 64 Briar Brae Road, Stamford, Connecticut.

DIRECT-EXAMINATION BY MR. SANDLER:

MR. SANDLER: Mr. Zimmerman, I presume the preliminary questions are waived?

MR. ZIMMERMAN: Yes.

Q Mr. Guy, are you familiar with the physical condition of Camden #2?

A Yes, I am.

Q Will you tell us what that physical condition is?

A I should preface my remarks by the fact that during the term of the lease as I know it now

we have no longer budgeted this building as a maintenance item for the estate.

THE REFEREE: In other words, that two cents per foot per year as a general budget consideration is not relevant for this property?

THE WITNESS: For the next twelve months I show zero.

THE REFEREE: Because of the terms of the lease?

THE WITNESS: Yes, sir.

THE REFEREE: Supposing the roof were to blow off?

THE WITNESS: If it is storm damage probably someone's out of pocket cost would be limited to ten thousand dollars.

THE REFEREE: But, in the ordinary life of the next year the ordinary wear and tear of this building - - parking lot damage, drainage, shrubbery, small water damage - - these are not the problems of the debtor here?

THE WITNESS: No, they are not. I did ascertain the physical condition of the building prior to the signing of the lease and

it appeared to be a pretty substantial building.

THE REFEREE: How about exterior painting?

THE WITNESS: No.

THE REFEREE: Who would do that?

THE WITNESS: I would say it would not be done.

THE REFEREE: That would not be the tenant's responsibility?

THE WITNESS: I really don't know but under the lease if I was leasing from you I would not paint the building and I don't believe in his lease when he assumed maintenance I don't believe he had ten thousand dollars or eight thousand dollars for painting our building or he would have asked for even more favorable figures.

THE REFEREE: Well, does the exterior of the warehouse fall within the responsibility of the lessee?

THE WITNESS: I would think not but I really don't know.

THE REFEREE: Go ahead.

THE WITNESS: I would see no reason why they would enter into painting the building.

THE REFEREE: The exterior?

THE WITNESS: The exterior.

THE REFEREE: Mr. Sandler?

MR. SANDLER: No further questions.

CROSS-EXAMINATION BY MR. ZIMMERMAN:

Q Mr. Guy, did you testify that the building needs painting?

A No, it does not need painting.

Q When was the last time it was painted?

A I really don't know the last time it was painted but the physical condition of the building externally paint-wise is in pretty good shape.

Q Did you personally examine the building?

A I have seen the building within the last five months.

Q Have you personally seen the building?

A Yes.

Q When?

A Either the latter part of August or early September, somewhere in that order.

Q What was the condition of the paint at

that time?

A Reasonably good.

Q That is not the same as very good, is it? Was it flaking?

A As I recall, I think there was only two or three small areas that showed any peeling or flaking and it's commonplace even on a new paint job.

Q Is it your experience that most paint damage occurs in the winter months?

A No, not necessarily unless you have water lines and it freezes. The sun does a lot of damage.

MR. ZIMMERMAN: No further questions.

THE REFEREE: Thank you.

MR. SANDLER: Your Honor, that concludes the receiver's case. I would like to point out for the record that with two ten-year renewal options this lease has thirty-eight years to go and in the twenty-year renewal term the rent reduces by twenty-five percent.

MR. ZIMMERMAN: Your Honor, I would like to renew my motion to strike the first affirmative defense and preface it by appealing to the conscience of the Court in the same

manner in which the defenses asserted by the receiver and debtor intend to appeal to the conscience of the Court's equitable powers.

As you can well understand, the landlord has experienced a lot of financial pain and suffering in this case, suffering a loss to date of over one hundred fifty thousand dollars.

The landlord has entered into negotiations to sell the building to relieve itself of these problems.

THE REFEREE: Let him sell it.

MR. ZIMMERMAN: But, any sale is subject to delivery of possession of the building. Accordingly, I think that under the facts of this case there is no question that this lease was terminated by agreement of the parties rather than by the exercise of any option of the landlord, and that this proceeding is not one to terminate the lease, but one to obtain possession, and that the receiver and debtor have not put in any testimony that in any way relates to Lane Foods.

There is no basis in the record to keep

the receiver in possession of these premises; there has been no reason advocated why they should remain in possession under a terminated lease.

Accordingly, even if the Court does grant the motion to strike the first affirmative defense I would move it strike the second affirmative defense because there is failure to make a prima facie case.

THE REFEREE: I will reserve on both motions.

MR. ZIMMERMAN: Your Honor, may I ask that a time limit be set for the receiver to serve an amended answer.

THE REFEREE: Give him an amended answer by next Tuesday.

MR. SANDLER: Can I have the exhibits by tomorrow?

MR. ZIMMERMAN: I will put them in the mail today or do you want to pick them up?

MR. SANDLER: Put them in the mail.

THE REFEREE: All testimony will be in by the 18th, and I want all briefs and post-trial briefs.

MR. BUCKIE: Is the rent being escrowed because it is not being paid?

MR. SANDLER: We are escrowing the taxes.

THE REFEREE: At least that was the commitment made. I assume you are not being treated differently than anyone else. If you are you will promptly advise the Court. Thank you.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

In the Matter
of

D. H. OVERMYER COMPANY INC.
(OHIO)

Debtor.

No. 73 B 1128

United States Court House
Foley Square, New York, N.Y.

February 21, 1974
3:30 o'clock a.m.

LANDLORD'S MOTION FOR POSSESSION (COLUMBUS #3)
HAHN, HESSEN, MARGOLIS & RYAN

Before:

HON. ROY BABITT, Referee In Bankruptcy

BARRY W. RAYVID
Official Court Reporter
U.S. Courthouse (R. 230)
Foley Square, New York, N.Y. 10007

APPEARANCES:

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New York, New York

BY: WILL B. SANDLER, ESQ., Of Counsel

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PROCEEDINGS

THE REFEREE: What property is this?

MR. SANDLER: Mr. Zimmerman wants to reverse the order and take Columbus Number 3.

THE REFEREE: What is DHM Industries?

MR. SANDLER: That's been taken care of. We consented to the relief requested and it's disposed of

THE REFEREE: The motion is granted on consent of them. Submit an order.

MR. ZIMMERMAN: This is Columbus Number 3, D. H. Overmyer Company, Inc. of Ohio. Your Honor, through inadvertence the order to show cause reads D. H. Overmyer Company, Inc. (Ohio) and should be changed to "Of Ohio," with the number changed to 73 B 1128

THE REFEREE: We can't undocket them. We will have to do the best we can. I will assume, then, that the response to the request for admissions of fact with the Number 73 B 1129 will be changed to 73 B 1128 and 1129.

MR. ZIMMERMAN: I offer in evidence a letter dated August 22nd, 1973, from Leonard S. Danaceau to D. H. Overmyer Company, Inc. of Ohio, together with a notice of termination, dated August 22nd, 1973, addressed to D. H. Overmyer Company, Inc. of Ohio and signed by Norman S. Glauber, Jr., together with the receipts for certified mail pertinent to them as Applicant's Exhibit "A".

THE REFEREE: We are talking about

Columbus Number ?

MR. ZIMMERMAN: Columbus Number 3.

THE REFEREE: Does the debtor own it in fee?

MR. ZIMMERMAN: No, the landlord owns it in fee.

MR. SANDLER: Columbus Number 99 was the fee property. The receiver has no objection to the receipt of these documents without drawing any legal conclusions from the contents thereof.

MR. ZIMMERMAN: Fine.

(At this time, the said documents were so marked as Applicant's Exhibit "A" in evidence.)

MR. ZIMMERMAN: I call Norman S. Glauber, Jr., to the stand.

N O R M A N S. G L A U B E R, J R., having been duly sworn by Honorable Roy Babitt, was examined and testified as follows:

THE REFEREE: Please give your full name and home address to the reporter.

THE WITNESS: Norman S. Glauber, Jr.,

127 Lake Avenue, Lakewood, Ohio.

DIRECT-EXAMINATION BY MR. ZIMMERMAN:

Q Mr. Glauber, are you the owner of certain premises located in Columbus, Ohio known as 3980 Groves Road and referred to as Columbus Number 3?

A Yes, I am.

Q Did you receive a tax bill for those premises?

A Yes, I did.

Q I show you a xerox of a tax bill and ask you if this is a copy of the bill which you received?

A Yes, it is.

MR. ZIMMERMAN: I ask that this copy of a tax bill be marked in evidence as Applicant's Exhibit "B".

MR. SANDLER: I am going to have to object because this tax bill nowhere at any point has an indication that it pertains to this particular lease that is at issue here, unless you can show me where it relates to the lease.

THE REFEREE: The property?

MR. SANDLER: To the property.

MR. ZIMMERMAN: It doesn't say Columbus 3.

THE WITNESS: It isn't addressed to me, it's addressed to 3980 Groves Road.

THE REFEREE: What is the address of that warehouse?

THE WITNESS: 3980 Groves Road.

THE REFEREE: Do you understand that to be Columbus Number 3?

THE WITNESS: That's what they call it. That's an Overmyer term but that's a street address.

THE REFEREE: What is your objection?

MR. SANDLER: I am willing to let it go in. I just want to make sure it's appropriate and that I understand it. What period is this?

MR. ZIMMERMAN: 1973.

MR. SANDLER: The receiver withdraws his objection and notes that the bill is for the first half of 1973 in the amount of forty-nine hundred sixty-four dollars plus delinquent taxes of forty-seven hundred thirty dollars and with interest comes to ten

thousand one hundred forty-nine dollars and twenty-seven cents.

THE REFEREE: When is that due?

THE WITNESS: Yesterday.

(At this time, the said document was so marked as Applicant's Exhibit "B" in evidence.)

MR. SANDLER: Mr. Zimmerman, in your request for admissions, you requested admissions that certain taxes were due. I assume that the tax bill you now introduced pertains to the same taxes with respect to which you requested admissions, is that correct?

MR. ZIMMERMAN: That is correct, which admissions were not given.

THE REFEREE: I have the response today. I don't know, since it was done on the 12th, why you couldn't have filed it.

Q Mr. Glauber, in looking at the tax bill, is it your understanding that the portion of these taxes which is marked DT in the amount of forty-seven hundred thirteen dollars and eighty cents constitutes taxes that were past-due?

A Correct.

Q And that the portion marked PT in the

sum of four hundred seventy-one dollars and thirty-eight cents constitutes a ten percent penalty for the non-timely payment of those taxes?

A That is correct.

Q Mr. Glauber, did Overmyer ever furnish you with conformed copies of sub-leases with its tenants?

A No.

Q Mr. Glauber, did Overmyer ever furnish you with any agreement in writing by any sub-tenants assuming Overmyer's obligation under the lease?

A No.

MR. ZIMMERMAN: No further questions.

CROSS-EXAMINATION BY MR. SANDLER:

Q Mr. Glauber, do you recall when you entered into this lease with Overmyer?

A February, 1968.

Q Who did you negotiate with at that time in connection with this transaction?

A My attorney, Leonard Danaceau negotiated with the principals of Overmyer. I don't recall exactly who.

Q You were involved, were you not, whether personally or through your attorney?

A Through my attorney.

Q Did you purchase this alone or do you have partners?

A I purchased it alone.

Q Was this lease part of a sale-leaseback transaction?

A Yes.

Q So that you understand, sir, you purchased the property and simultaneously leased it back to Overmyer, is that correct?

A That is correct.

Q Do you know at the time you purchased there was a mortgage on the fee that had been placed by Overmyer, a long-term mortgage?

A Yes.

Q Did you know what the interest was on that mortgage?

A I believe it was six and a half percent.

Q Do you consider it a favorable mortgage?

A At that time, as is today, is favorable.

Q You consider it a favorable mortgage

today?

A Sure.

Q Can you tell me how the rent you were to receive under the lease was arrived at?

A Ten percent of my investment.

Q Cash investment?

A Cash investment.

Q Now, the lease commenced in 1968, is that correct?

A Correct.

Q Which is approximately six years ago. At the commencement of the lease, did you request that Overmyer furnish you with copies of the sub-tenants' leases?

A Yes, sir.

MR. ZIMMERMAN: Objection as to relevancy.

THE REFEREE: I will allow it.

Q You did?

A Verbally.

Q Did you ever get copies?

A No.

Q Now, we are talking about the commencement of the lease which is six years ago. After you

verbally requested copies and didn't receive copies, did there come a time when you requested them a second time verbally or in writing?

A My attorney did from time to time. It certainly didn't seem that important at the time that I have copies.

Q During this period from the commencement of the lease when you initially requested them verbally and thereafter when your attorney requested them from time to time, I take it you never received them?

A Right.

Q Did you ever declare a default by reason of the non-receipt?

A No.

Q After the lease commenced, did you receive your monthly rent payments promptly?

A No.

Q Were they usually late?

A Yes.

Q Were they usually late from the very beginning of the lease, from 1968?

A From the early months, yes.

Q Did you complain about that?

A Yes.

Q Did you write letters about it?

A Yes.

Q Did you ever declare a default?

A We did much later but not at that time.

Q I am not talking about the default in connection with this case. Prior to this case, did you ever declare a default by reason of late payments?

A No.

Q The late payments that were sent to you were deposited by you?

A Correct.

Q And, aside from the arrears that exists today, all of the prior rent payments were paid to you even if they were paid late, is that correct?

A Correct.

Q When you were negotiating this sale-leaseback transaction for a ten percent return, in evaluating the investment, did you take into account the tax shelter you would receive?

A Certainly.

Q Are you an accountant, sir?

A No.

Q Can you tell me what your profession is?

A Textile manufacturer.

Q When you say "certainly," were you aware of this yourself or was it pointed out to you by an advisor or your attorney?

A It was pointed out to me by the party that interested me in the deal.

Q Since the commencement of the deal, have you been receiving the tax shelter that had been projected?

A Yes.

Q Sir, one final question, when you went into this transaction for the ten percent return, and the tax shelter, did you understand that you were going into the real estate business or did you understand you were making an investment for a return?

MR. ZIMMERMAN: Objection, Your Honor.

THE REFEREE: I will allow it. I don't think it makes much difference, anyway.

A I looked at it both ways.

Q Now, sir, if all of the arrears that are owed to you were to be paid, would you have any objection to reinstating the lease to the extent that you claim it's been terminated?

Would you have any objection to rein-

state the lease with the receiver?

A Yes.

Q Why is that?

A Because I have no trust in Overmyer, due to the late payments and various other misstatements he has made.

Q Now, sir, if I told you we could assign this lease to a third party, a responsible third party, and simultaneously pay all of your arrears, would you have any objection to dropping your claim with regard to the alleged termination of the lease and accepting the third party as the new tenant under the lease?

A If it were an acceptable third party, I have no objection.

Q What would you say constitutes an acceptable third party?

MR. ZIMMERMAN: Your Honor, this is totally irrelevant to this case.

THE REFEREE: It has some bearing. It's gone as far as it's going to go. I will sustain the objection.

MR. SANDLER: No further questions.

RE-DIRECT-EXAMINATION BY MR. ZIMMERMAN:

Q Mr. Glauber, could you tell the court

how you got the money to pay your taxes?

A I borrowed the money from the Cleveland Trust Company.

MR. ZIMMERMAN: No further questions.

RE-CROSS-EXAMINATION BY MR. SANDLER:

Q Mr. Glauber, do you own any stocks and bonds?

A Some, yes.

Q Can you tell me what they are worth in today's market?

MR. ZIMMERMAN: Objection.

MR. SANDLER: Your Honor, Mr. Zimmerman on re-direct - -

THE REFEREE: Let me hear the question again.

(The last question was read back by the reporter.)

THE REFEREE: I will sustain the objection. I don't think he has to sell his securities.

MR. SANDLER: No, sir.

THE REFEREE: He can get the money to pay that tax wherever he likes.

MR. SANDLER: The implication from Mr.

Zimmerman's question was he had no other funds.

THE REFEREE: I am going to sustain the objection.

Q Do you have a checking account?

A Yes.

Q Can you tell me what is in it?

A About two thousand dollars.

Q Can you tell me what is in your business account?

MR. ZIMMERMAN: Objection.

THE REFEREE: I will sustain that.

Q Do you have any partners in your textile business?

A Yes.

Q What percentage of that business do you own?

A Forty-five percent.

Q Is it a profitable business?

A Yes.

THE REFEREE: You act as though it's a crime for a man to invest.

MR. SANDLER: Not at all. I don't want the record to read as though the landlord and the fee owner is down to his last ten cents

when it's not true.

THE REFEREE: I don't care. If he has been imposed on, he's been imposed on. I don't think a man who invested his money is bound to throw in more money because of your defaults.

The objection is sustained.

MR. SANDLER: Exception.

MR. ZIMMERMAN: No further questions.

THE REFEREE: Do you have any more witnesses?

MR. ZIMMERMAN: Not on direct. The direct case is closed.

MR. SANDLER: Mr. Flanagan.

THE REFEREE: Have there been any stipulations on Mr. Flanagan?

S A M U E L H. F L A N A G A N, having been duly sworn by Honorable Roy Babitt, was examined and testified as follows:

DIRECT-EXAMINATION BY MR. SANDLER:

Q Mr. Flanagan, we are on Columbus 3; we took them out of order this morning.

MR. SANDLER: Will you waive the

preliminary facts with regard to the employment of Mr. Flanagan?

MR. ZIMMERMAN: Yes.

Q Mr. Flanagan, do you have with you records kept in the ordinary course of business which indicate how much rental income the receiver receives from the sub-tenants at Columbus 3?

MR. ZIMMERMAN: Objection, Your Honor. He is leading the witness by stating a conclusion.

THE REFEREE: He is only bringing him to the records. Overruled. Let's get into the heart of this.

A Yes.

THE REFEREE: How much do the sub-leases provide for?

THE WITNESS: Ten thousand four hundred twenty-two dollars per month.

Q What is the payment paid by the receiver under the lease to the landlord for rent and taxes?

A Sixty-seven hundred dollars in rent and an escrow of seven hundred eighty-six dollars in taxes for a total of seventy-four hundred eighty-six dollars.

THE REFEREE: About twenty-eight hundred dollars a month?

THE WITNESS: Twenty-nine hundred thirty-six dollars, I believe.

Q Annualized that figure is?

A Thirty-five thousand thirty-two dollars.

Q Are there any vacancies in this building at this time?

A None.

MR. SANDLER: No further questions.

CROSS EXAMINATION BY MR. ZIMMERMAN:

Q Mr. Flanagan, who are the tenants?

A Mid-West Warehousing. The former manager, Jeff Monakin, is operating eighty-two thousand five hundred square feet. Capitol Polybag is operating twenty thousand square feet, which is a fabricating and manufacturing operation; and, A-1 Skyway operates seventeen thousand five hundred square feet.

Q How much rent does A-1 Skyway pay?

A Twenty-three hundred dollars a month.

Q Capitol Polybag?

A Twenty-three hundred forty-six dollars.

Q What is the length of their sub-leases?

A A-1 Skyway's lease terminates on 5/31/74; Capitol Polybag's lease terminates on 12/31/77 and they have a five-year option; and, the third tenant has a - - I don't think it's been fully executed; I know it has not been fully executed - - a lease that will be executed and will terminate on 12/31/74.

Q Are you aware as to the financial viability of Mid-West Warehousing?

A No, sir.

Q Do your records contain any evidence of the financial stability of that party?

A No, sir.

Q Is, in fact, the Mid-West Warehouse Company a public warehousing operation set up by the former warehouse manager employed by Overmyer?

A Yes. I do not know whether he is a one hundred percent owner or not or what his financial arrangements are. He is a principle in the company.

Q What portion of the warehouse of Overmyer warehouse space in Columbus does Mid-West

Warehouse rent; what percentage of the total space?

A They lease three hundred twenty-nine thousand square feet, I believe is the correct number, and this is out of six hundred sixty thousand square feet, I believe is the amount.

Q Has Mid-West been making its payments to the receiver timely?

A Yes. Let me say all of their payments through January have been made. I can't answer for February this morning because I do not know.

Q Would your records indicate whether payment was made at the beginning of February?

A No, it would not, ot what I have here.

Q What was the income for January on this property?

A Ten thousand four hundred twenty-two dollars.

Q What was the income for December?

A Ten thousand four hundred twenty-two dollars.

Q What was the income for November?

A These records do not indicate it.

MR. SANDLER: I am going to object.

Mr. Flanagan is a witness for the receiver who went into operation on November 16th.

THE REFEREE: He also worked for this debtor for a number of years. Overruled.

Q These records do not indicate what the rent received for November was?

A Not the ones I have here.

Q Are these records prepared in the ordinary course of business or were they prepared for this proceeding?

A They are kept in the ordinary course of business.

THE REFEREE: Those are the receiver's records?

THE WITNESS: Yes, sir.

Q They do not indicate any collections prior to December 1st, 1973, is that correct?

A No, sir.

MR. ZIMMERMAN: Your Honor, I move that all testimony - -

THE REFEREE: Overruled.

MR. ZIMMERMAN: Can't I finish my objection?

THE REFEREE: No, overruled. It has

no merit from the first words.

MR. ZIMMERMAN: No further questions, Your Honor.

MR. SANDLER: Mr. Guy.

THE REFEREE: We understand that the figures given here are top of the line figures and we all understand that's in keeping with all the other trials we have had here.

How many times have I sworn you, Mr. Guy?

MR. GUY: A bunch.

THE REFEREE: You are sworn again and are still under oath.

M U R R A Y G U Y, having been previously sworn by Honorable Roy Babitt, was examined and testified as follows:

MR. SANDLER: Mr. Zimmerman, do you concede the witness' expert qualification and present employment by the receiver?

MR. ZIMMERMAN: Yes.

DIRECT-EXAMINATION BY MR. SANDLER:

Q Mr. Guy, in your present position with the receiver and prior to that with the debtor, have you arrived at a general average figure for maintenance of the Overmyer warehouses for routine maintenances?

MR. ZIMMERMAN: Objection as to relevancy.

THE REFEREE: Overruled.

A Yes, I have.

Q Can you tell us what that figure is?

A We estimate two cents per square foot on an annual basis for reoccurring maintenance, items responsible by Overmyer and above those responsible to the sub-tenants.

Q Can you tell us if the Columbus 3 warehouse needs any repairs or maintenance at the present time?

A The extent of the repairs needed are primarily in the area of paving - - the extent of it is minor. We have done some, you might say, winter-work, to the extent of filling in a number of pot holes in the paving which in spring you would have to replace that with asphalt.

THE REFEREE: Is that within the

budget?

THE WITNESS: Yes, it is.

THE REFEREE: Is the replacement with asphalt within your two cents a square foot budget?

THE WITNESS: Yes.

THE REFEREE: How many square feet are in Columbus?

THE WITNESS: It's one hundred twenty thousand square feet.

Q Have you now testified to the extent of the present work that has to be done?

A In dollars?

Q Not in dollars, in terms of items?

A I know of no other work pending on that building other than the asphalt work.

Q Can you estimate the cost in dollars in doing the work that has to be done at this time?

A Twenty-five hundred dollars to three thousand dollars.

THE REFEREE: Is that within your budget?

THE WITNESS: Yes, it is, Your Honor.

THE REFEREE: That breaks down to a

little more than twenty-four hundred dollars a year. How do you work that out? Supposing this place needs three thousand dollars now and it might need another one thousand dollars during the next year?

THE WITNESS: Your Honor, I think we have in Columbus alone some seven hundred thousand plus square feet of space.

THE REFEREE: You could take that - -

THE WITNESS: We would look at that as a city of repairs and two cents over that amount gives you a pretty good budget.

THE REFEREE: Two cents for that area?

THE WITNESS: Yes.

THE REFEREE: Supposing you have a property that stands alone in the location and twenty-four hundred dollars doesn't begin to do the yearly maintenance, what you call reoccurring type things. How do you accommodate that?

THE WITNESS: Then I write a special work request to the - - presently I don't know who to give it to. It used to be ODS - -

advising them to put the property in reasonably good shape that they should appropriate additional monies.

In most cases it has been approved by Mr. Crawford, the divisional vice-president.

THE REFEREE: Is it your experience that two cents per foot allocable to all of the properties of Overmyer is reasonable?

THE WITNESS: Yes. It works out to be something that could be accomplished with the number of people we had on the payroll and with the upgrading efforts we made.

THE REFEREE: Does that not include the general nation-wide uplift of general nation-wide roof repairs?

THE WITNESS: No. We almost double that. During last year we spent almost four cents a square foot on a nation-wide basis.

MR. SANDLER: No further questions.

CROSS-EXAMINATION BY MR. ZIMMERMAN:

Q Mr. Guy, have you ever inspected Columbus Number 3?

A Yes, I have.

Q When was the last time you inspected those premises?

A Mid-July.

Q Your report on the maintenance status of the building, what is that based on?

A Well, it's based on previous work that we have done in about September, and then the latest report was early January from Jeff Monakin who operates in that building and he gave me the status of the work.

Q Does Mr. Monakin have any expertise in the field of building maintenance?

A I feel pretty confident that Mr. Monakin would like to get his particular warehouse in as good a shape as possible since he now owns and operates the operation in that warehouse.

All I can say is if I was him I would have advised of every damn thing I would have found to need repairs. I do not know his professional background to that extent.

MR. ZIMMERMAN: Your Honor, I move that all the witness' testimony regarding the present maintenance problems of the building be stricken.

THE REFEREE: Overruled. Your objection is wrong.

MR. ZIMMERMAN: Your Honor, this witness has no personal knowledge about maintenance.

THE REFEREE: We understand. That is the way big business is these days.

Q Mr. Guy, before the petition for arrangement was filed, how many maintenance personnel were employed by Overmyer in the Columbus area?

A We had - - most of that area was under contract with the paving, a contractor being the prime individual servicing the Columbus area. We handled all of that out of Atlanta, Georgia.

Q How much personnel did you have in Atlanta?

A Permanent people we had nine to twelve people; casual payroll usually runs thirty-thirty-five people.

Q How many permanent people does Overmyer presently have employed in the Atlanta area?

A Currently our entire maintenance program is by contract and I am the only Overmyer employee.

Q Was the national two cents a square

foot average arrived at by considering the savings of maintenance personnel to do routine maintenance?

A I don't quite understand the question.

Q I will rephrase it. Was a component of your two cents a square foot national average the savings involved in employing your own maintenance personnel?

MR. SANDLER: Objection as to form. There is an implication; there is a form - - we don't know there is a savings.

THE REFEREE: I will overrule it.

MR. SANDLER: It could be more expensive.

THE REFEREE: I understand. Overruled.

A By having our own people we save a considerable amount of money and this is primarily because we had a track crew and they had a panel truck; they had the equipment and track repairs.

For instance, we only paid the guy seven hundred forty dollars a month plus minimal expenses and in most cases the track, the estimates to repair the track, were three times what we were preparing them for with out own people. Most all the people we have hired were previous sub-contractors to

Overmyer and by hiring them we made a savings to the company, and we also trained them to do multiple jobs rather than be a specialist in a particular job.

Q In light of this statement, Mr. Guy, would you care to change your national maintenance average upwards?

A No.

Q In other words, Mr. Guy, the increased cost of contract labor over the cost of employing your own maintenance staff will not increase the national average, is that correct?

A Well, you have to take into consideration the areas in which we have buildings left geographically and the distance between these.

When we have one-third as many properties as we had before, my analysis is that it would be too expensive to have these people try to cover the United States. When they used to go by two buildings, we used to have them get the third building. On that basis today, I have let a number of roof contractors. I couldn't have a man come from Atlanta to New Jersey and do a two thousand dollar job.

Q Mr. Guy, I am having a problem of comprehending.

THE REFEREE: You or he?

MR. ZIMMERMAN: I think he understands, Your Honor. I don't understand what he is saying.

Q Mr. Guy, this two cent a square foot, is that the figure that was budgeted by Overmyer prior to going into this proceeding?

A Yes.

Q Prior to going into this proceeding how much of the maintenance work done by Overmyer in its areas was done by maintenance personnel employed by Overmyer as contrasted to work contracted out?

A It would be a ratio of one hundred eighty-three over three hundred - - say forty-five percent - - no, I am sorry, I'll bet it goes to fifty-five or sixty percent.

Q You previously testified that contract labor usually costs between two and three times as much as when you have your own maintenance staff do it when you had all of the warehouses?

A That is correct. You can't make a comparison of costs to man-hours. I think, maybe, that is what you are trying to do.

Q Mr. Guy, based upon your expertise in

this field and your particular expertise with regard to the maintenance problems incident to the Overmyer warehouses, can you come to an estimate as to how much it is going to cost per annum per square foot to maintain the Overmyer warehouses?

A Yes.

Q What is that estimate?

A You asked me if I could come to it. It would take a few minutes to do it.

Q The minutes are yours. Do it.

THE REFEREE: As they are now.

A I mean, the two cents is the answer to that question. I misunderstood the question. I thought you wanted to know what my dollars budget would be for this year's annual expenditures.

Q Let me go back. Mr. Guy, what portion of the two cents that was previously budgeted went for maintenance and payroll and contract labor?

A What portion?

Q Yes, of the two cents went to maintenance, payroll and contract labor.

A The whole thing. I mean, that's the budget.

Q How much of it went to supplies?

A Well, your supplies are in there.

THE REFEREE: In other words, he is asking you to break down the two cents. Quickly; I want this done in five minutes. I have now heard this witness forty times.

THE WITNESS: It's a little difficult.

THE REFEREE: How much of the two cents; what percentage of the two cents or what part of the two cents is allocable to help?

THE WITNESS: To help would probably be probably close to three-quarters of a cent to one cent.

Q The rest is for what?

A Direct maintenance labor employed by Overmyer.

Q Three-quarters of a cent?

A To a penny.

Q How much went to supplies used by this maintenance staff?

A Half of their wages would be additional for supplies.

Q Now we have accounted to the Court for one and three-quarter cents?

A One and a half.

Q The other three-quarters would go to contract labor?

A That is correct.

Q Of that three-quarters, would you split that up to what the contractors' supplies would cost?

A No, we do all the work on the firm price bid and competitive basis. We have no way of knowing what he pays for the individual materials.

Q Would it be fair to say, Mr. Guy, that at least one and three-quarter cents of the two cents went for labor?

A Yes, that might not be too far off. It's possible. I don't know what we are getting at.

Q You said that three-quarters of this one and a quarter cents went for staff that you employ directly, is that correct?

A Yes, used to employ.

Q In light of this, Mr. Guy, isn't it obvious that since you are going to have to contract out the work that was done by your maintenance staff and the contract labor costs three times as much as it costs for your maintenance staff, that your two cents is all wet?

A No, not at all.

MR. SANDLER: Counsel is becoming argumentative.

Q Would you please explain that?

THE REFEREE: Let him answer.

Q In the first place, in the valuation of the property we presently have - - we have disposed of many of the high maintenance properties to the extent that I believe we only have a few that require forty thousand dollars plus work of extraordinary expenses which, in turn, those same properties took much more of the two cents on a routine basis.

Q Mr. Guy - -

MR. SANDLER: Let him finish.

THE REFEREE: Are you finished with that answer?

MR. SANDLER: I am sorry if you don't like the answer, Mr. Zimmerman, but let him finish.

THE REFEREE: I will make the rulings, Mr. Sandler. He and you can debate at a bar.

A The buildings which we have currently are pretty darn good buildings from an income standpoint and maintenance standpoint and there is now only

a handful of them that need extraordinary repairs. Many of them need no repairs at all.

I can go through a list of buildings and show you in some cities we won't spend a dollar this year. Those are buildings where the sub-tenants are obligated to take care of their door maintenance, paving repairs, the bumpers, so on and so forth.

We would keep the integrity of the roofs up and all structural parts of the building, that's number one. Number two, if we have appropriated one hundred eighty thousand dollars a year to handle our maintenance problems, we are already pretty well into the year and I can tell you that we are below that, our expenditures for the first five or six weeks are much below the two cent budget. We are still prepared to go on with this ongoing business spending two cents for maintenance and repairs and I am having no problems whatsoever in getting these appropriations made, and we will take care of these maintenance problems throughout the whole country by putting people back on the payroll when we get more substantially established or by hiring the non-union contractors in the areas.

In some cases we have paid our old

managers for patching the roofs which in that case are the equivalent expense of what we used to do ourselves.

Q Mr. Guy, have you not previously testified that the two cent a square foot does not include extraordinary maintenance?

A That's right.

Q How can you now say that you don't have many forty thousand dollar jobs? That's irrelevant to the two cents a square foot, isn't it?

MR. SANDLER: I object.

THE REFEREE: Overruled.

A I didn't make it part of it, I made the point that the building we kept - - the buildings - - are good buildings.

Q But, in other words, Mr. Guy, the two cent average that you used to have - -

MR. SANDLER: Objection.

THE REFEREE: That is correct, he did not testify he used to have it.

Q Is not at all relevant to the future?

MR. SANDLER: Objection.

THE REFEREE: I am going to sustain the objection. You speak to the two cents a foot without characterizing it.

Q Mr. Guy, prior to this proceeding, did Overmyer budget two cents a square foot for ordinary maintenance?

A Yes.

Q Would the same considerations that went into the budgeting of two cents a square foot pre-petition apply to the budget for the present and ongoing period?

A We are leaving it at that. It might be something less.

Q Mr. Guy, can you answer my question? Would the same considerations go into the computation of the number?

A Absolutely.

Q What considerations are those?

A The two cent a square foot for a budget of that nature will handle all our maintenance problems in the current year.

Q Mr. Guy, could you estimate what kind of repairs have to be made on the average for all of your buildings?

THE REFEREE: He can't predict. He said in a business like this, his budget is two cents a square foot. I don't think you under-

stand what he is testifying to.

MR. ZIMMERMAN: I think I do.

THE REFEREE: It doesn't sound like it to me from your examination.

Q Mr. Guy, are you aware of the condition of the doors on this warehouse?

A Not in any - - I have no knowledge of it other than it's the responsibility of the sub-tenant to repair the doors from mis-use by fork truck operations, and whatever.

Q Do the sub-tenants on these premises have an obligation to repair these doors?

A Yes, they do.

Q Is it the receiver's responsibility to enforce this obligation?

A I don't want to give my own opinion. I don't know the receiver's position.

Q What about Overmyer prior to the petition?

A I felt some pride that we would like to have our buildings look good to the public. They wouldn't if they had holes in them.

Q Do you know if the doors need repairs on this building?

A I understand there are three doors that have panels that need some work done on them. Definitely we would not do the work.

Q You would not repair the panels?

A If we did, we would take them from the sub-tenants.

Q When was the last time this building was painted, Mr. Guy, on the exterior?

A I don't know.

Q Was it ever painted on the exterior?

A I don't have that information.

Q What would it cost to paint the exterior of a building of this kind?

A Ten and a half cents per square foot.

Q How much would that be?

A Seventy-four thousand square feet, seven thousand four hundred dollars; I'd say seventy-seven hundred dollars.

Q Would you know if there is a water seepage problem in this building?

A I don't know of any. Are you talking about from the roof or floor?

Q Walls.

A I don't know of any.

Q Did you inspect this building to determine whether there was such a problem?

A There was none in July when I looked at it.

Q You haven't inspected the building since July, have you?

A Personally, no. It has been inspected.

MR. ZIMMERMAN: No further questions.

MR. SANDLER: No further questions.

THE REFEREE: Are you finished?

MR. SANDLER: Yes.

MR. ZIMMERMAN: Can I recall Mr. Glauber for a minute?

THE REFEREE: One minute only.

Mr. Glauber, you are still under oath.

N O R M A N S. G L A U B E R, J R., having been previously duly sworn, was examined and testified further as follows:

THE REFEREE: Have you been to the building recently?

THE WITNESS: Yes.

THE REFEREE: Tell me what you have

seen there? Is that what you were going to ask him?

MR. ZIMMERMAN: Yes.

THE WITNESS: Besides the drive-way being in very bad shape - -

THE REFEREE: What do you mean in bad shape, potholes?

THE WITNESS: Potholes.

THE REFEREE: Like you find in New York streets?

THE WITNESS: Much worse.

THE REFEREE: Is that a winter situation?

THE WITNESS: Yes. The property is not maintained around the building.

THE REFEREE: What do you mean not maintained?

THE WITNESS: Well, the grass and weeds.

THE REFEREE: I didn't know grass and weeds grew in this time of year.

THE WITNESS: They were never cut from last year, last summer.

THE REFEREE: How about the shrubbery and landscaping?

THE WITNESS: No landscaping.

THE REFEREE: Who decides whether there is supposed to be landscaping, a gardener, you or your wife?

THE WITNESS: Overmyer was supposed to plant and landscape.

THE REFEREE: They were supposed to have shrubs there?

THE WITNESS: Yes.

THE REFEREE: What else?

THE WITNESS: This isn't my main objection. My main objection is the doors are in very bad shape.

THE REFEREE: Are they operating?

THE WITNESS: I don't know, I didn't try them.

THE REFEREE: Have you heard complaints that they are not operating?

THE WITNESS: I heard complaints from Jeff Monikan that the doors are in bad shape.

THE REFEREE: I am in bad shape, yet I am sitting here and doing the best that I can. He didn't indicate that he wasn't using all the doors?

THE WITNESS: There is another problem,

water coming in.

THE REFEREE: From the doors?

THE WITNESS: Water coming in from under the roof making the walls inside wet. The buiding has never been painted.

THE REFEREE: Ever?

THE WITNESS: It was painted when it was new but never since. Paint is peeling off the gutters and the sides of the building. I personally don't think there has ever been any maintenance on that building.

THE REFEREE: Thank you. We have finished Columbus Number 3?

MR. ZIMMERMAN: Yes.

THE REFEREE: Thank you, gentlemen.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

In the Matter
of

D.H. OVERMYER CO., INC.,

Debtor

No. 73 B 1131

United States Court House
Foley Square, New York, N.Y.

March 7, 1974
9:00 o'clock A.M.

LANDLORD'S MOTION FOR POSSESSION - RUPLE - DENVER #1

Before:

HON. ROY BABITT, Referee In Bankruptcy

BARRY W. RAYVID
Official Court Reporter
U.S. Courthouse (R. 230)
Foley Square, New York, N.Y. 10007

A P P E A R A N C E S:

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Attorneys for Receiver
292 Madison Avenue
New York, New York
BY: WILL B. SANDLER, ESQ., Of Counsel

- - - - - - -

P R O C E E D I N G S

THE REFEREE: Now we are dealing with Ruple.

MR. SANDLER: Denver #1.

THE JUDGE: I have an Answer by both the Debtor and the Receiver.

MR. PARKER: If Your Honor pleases, my name is Irving Parker and I appear here on behalf of the Applicant.

There is pending a Debtor's motion

brought on by Order to Show Cause which I understand is to be withdrawn, is that the 69D motion?

MR. SANDLER: Yes.

THE JUDGE: I will note it is withdrawn.

I don't have those papers. There are so many here that they seem to be miscarried.

It will be eventually noted on the record insofar as that motion sought relief against you it is being withdrawn.

MR. SANDLER: Thank you, Your Honor.

I would like to call Mr. William Ruple.

THE JUDGE: Are you aware of the facts that have been stipulated to in all of the other proceedings?

MR. PARKER: I am not. I have attempted to streamline the examination. I hope it will not be a burden.

THE JUDGE: I am not concerned.

In many of these there are facts that are being stipulated.

You will hear basically on the Defendant case - - aren't these all being conceded - - how much is due under the lease?

MR. SANDLER: We are willing to stipulate that.

MR. PARKER: I can say this to Your Honor, I did have occasion to speak to Mr. Sandler. I think there are some differences.

There were several facts he was not entirely inagreement with such as arrears.

MR. SANDLER: We have checked that out. You are correct; I would stipulate that.

MR. PARKER: I think it's going to be more orderly if I can continue.

W I L L I A M R U P L E, Called as a witness, having been first duly sworn by Hon. Roy Babitt, was examined and

testified as follows:

EXAMINATION BY THE JUDGE:

Q What is your full name?

A William Ruple.

Q Where do you reside?

A 4756 Beidler Road, Willobny, Ohio, 44094.

EXAMINATION BY MR. PARKER:

Q Mr. Ruple, you are the owner of a warehouse building and the land on which it stands located in Denver, Colorado?

A Yes, sir.

Q The address of that property, sir?

A 4200 East 52nd Street.

Q Denver, Colorado?

A Denver, Colorado.

MR. PARKER: If Your Honor pleases, that is the property which has been referred to, I believe, as Denver #1.

Q Do you personally and individually own the warehouse and property on which it stands known as 4200 East 52nd Street, Denver, Colorado?

A Yes, sir.

Q You acquired that property by purchase, did you?

A Yes.

Q When was that, sir?

A November 11, 1967.

Q Who was the seller of that property to you?

A D. H. Overmyer of Colorado.

Q That is a Colorado corporation?

A Yes.

Q What were the purchase terms of the purchase of that property, sir?

A I paid $300,000 in cash and assumed a mortgage of $524,000 plus a little bit.

Q Do you know how many years that mortgage still has to run until maturity, sir?

A Nine years.

Q Did you receive a warrant deed from D. H. Overmyer Co., Inc. when you purchased the property in November, 1967?

A Yes, I did.

MR. PARKER: If Your Honor pleases, I think we can expedite it

if you permit me to mark as Applicant Exhibit "1" a copy of the deed.

I don't think there will be any question about it.

I am handing a copy to Mr. Sandler.

MR. SANDLER: No problem.

THE JUDGE: Is that really important to my decision?

MR. PARKER: Not necessarily.

MR. SANDLER: We would like it marked.

MR. PARKER: Mark it as Applicant's Exhibit "1".

(Deed described above was marked Applicant Exhibit "1" for Identification, as of this date.)

Q Is there a tenant in the warehouse which goes by the name of Denver #1, sir?

A Yes.

THE JUDGE: Is that a 120,000 foot warehouse?

THE WITNESS: Yes, sir.

Q The name of the tenant?

A D. H. Overmyer.

Q When did the tenancy of D. H. Overmyer begin?

A November 11, 1967.

Q There is a written lease with reference to that tenancy?

A Yes, sir.

Q The date of that lease?

A November 11, 1967.

MR. PARKER: If Your Honor pleases, may we have marked as Applicant's Exhibit "2" the lease.

(Lease described above was marked Applicant's Exhibit "2" In Evidence, as of this date.)

MR. PARKER: If Your Honor pleases, may I simple point out that the lease provides for a term of twenty years in Section 2.01 and that in Section 3.02 the tenant is required to pay a fixed annual rent in equal monthly installments and all taxes and repairs for the continued operation of

the warehouse.

In short, it is a net lease.

The annual rent provided for in the lease under Section 3.01 is $82,200 a year and it is payable in monthly installments of $6,850 each, and that the monthly payments are due and payable on the 25th day of the month preceding the month for which payment is being made, and that is provided for in Section 3.01 of the lease.

Q In reference to the mortgage of the property that you assumed, do you know the name of the mortgagee?

A U.S. Life.

Q Mortgage Corporation?

A Yes.

Q Are you required to make monthly payments pursuant to that mortgage?

A Yes, sir.

Q Can you tell us what the monthly payments are?

A $4,350.

Q Per month?

A Per month.

Q Have you, sir, as the owner of Denver #1 made timely monthly payment on every occasion to U.S. Life Mortgage Corporation?

A We have a perfect record.

THE JUDGE: On this twenty year term are the monthly payments the same all through the life?

THE WITNESS: Yes, sir.

MR. PARKER: There is no option of renewal.

MR. SANDLER: If I may - -

MR. PARKER: Wait, why don't you wait?

Q Now, after you entered into the lease with Overmyer of November 11, 1967 did you thereafter for a time refer monthly payments, sir?

A He paid but was usually thirty days or a month late.

Q Now, is D. H. Overmyer Co., Inc. in arrears in the payment of any monthly installments of rent at this time, sir?

A Yes, sir.

Q Is that for a month or more than a month?

A He's six months in arrears.

Q Now that is for the year 1973?

A '73.

Q That does not include the year 197 does it?

A No, sir, no.

THE JUDGE: Are rent payments for use and occupation paid here?

THE WITNESS: This is prior to the Bankruptcy.

MR. LIPLAND: We are not agreeing with his time.

THE JUDGE: This is 1974?

THE WITNESS: We were eight months

MR. PARKER: To answer your question if I may, we have not yet received notice.

I understand we will be receiving a payment for February. We have not received any payment yet.

THE JUDGE: Aren't those checks here today?

Had I not directed that the checks be brought here for countersignature?

MR. SANDLER: On the particular check for this property I spoke to Mr. Parker yesterday.

We cleared up a problem with Mr. Parker's assistance in connection with one tenant.

Mr. Parker directed or suggested to the subtenant he pay the Receiver.

The subtenant paid the Receiver's new property manager out in the area.

The check was being issued yesterday and I asked that it be sent down for your countersignature today.

Hopefully it is - - it will arrive while Mr. Parker is still in Court so he won't have to send up for it.

THE JUDGE: The 1973 arrearage, does that include December, '73?

MR. PARKER: No, Your Honor. I

would specify those if I may, the arrearage here that you just spoke for the six months, that - - does that include November?

THE WITNESS: Including November.

EXAMINATION BY MR. PARKER:

Q Now, sir as to the six months in 1973 to which you referred as months of arrearages in payment of rent, can you identify those rents for us?

A April, May, June, July, October and November.

Q Of 1973?

A '73.

Q Sir, did you have any discussion in 1973 with any representative of Overmyer concerning the rent arrears?

A Yes, Dan Overmyer was in Cleveland on March 6, 1973 and we discussed this situation that he was in with me as far as being back in rent.

Q Did you discuss with Overmyer any intention to terminate the lease for non-payment of rent, sir?

A I told him I would accept notes from him but, also, I wanted to give him my thirty day notice

to get my building back if it was not taken care of, and he talked me out of that.

Q Was an arrangement made between you and Overmyer in reference of any of the rent payments in arrears for April, May, June and July, 1973, those four months?

A He gave us notes for those four months plus interest.

Q When were those arrangements made, sir?

A The final arrangements were made in the fall.

Q Of 1973?

A '73.

Q In making those arrangements what, in substance, was said by you and what, in substance, was said by Mr. Overmyer?

A For me taking notes he was in the process of arranging a loan and the loan would be finished or, in other words, he would have the money by October 31st and he would be bringing me up to date and, also, when I took the notes if I did accept the notes from him, he was to pay current for every month

after that.

Q That is to say commencing with August he would be current and would not fall in arrears again?

A That is correct, he did pay for August. I took a note for August.

THE JUDGE: There was one month that you omitted.

MR. PARKER: I am going to bring all of this out for Your Honor.

I hope I can say - - I hope I can satisfy YOUR Honor as to the facts here.

Q Now, Mr. Overmyer did cause four notes to be delivered to you in respect to the months of April, May, June and July, 1973, sir?

A Yes, sir.

MR. PARKER: If Your Honor pleases, to save time, I do have the four notes here. I am exhibiting them now to Mr. Sandler.

If I may, with Your Honor's permission - - if Your Honor would care to

have them, I have some copies of those notes.

THE JUDGE: No.

MR. PARKER: If Your Honor please, may I offer and have marked In Evidence these four notes as Applicant's Exhibit "3".

THE JUDGE: We will take it as a single Exhibit.

(Notes described above were marked Applicant Exhibit "3" In Evidence, as of this date.)

MR. PARKER: And I am making available to Mr. Sandler Xerox copies of the originals of those notes.

MR. SANDLER: Thank you. That is very considerate.

MR. LIFLAND: Do you have another set?

MR. PARKER: Yes. And for Mr. Lifland, Your Honor.

If Your Honor pleases, in respect to those notes, each of the four notes is

in the amount of $6,850.00.

They each provide for interest at the rate of 11% per annum and each of them has an identical maturity date of October 31, 1973.

The first of the notes is for the rental payment due for April, 1973, the second is for the rental payment due for May, 1973, the third is for the month of June, 1973 and the fourth is for the rental payment due for July, 1973.

Q Mr. Ruple, did you have occasion to speak with Dan Overmyer about payment of the notes, all of which have been marked as Applicant's Exhibit "3", prior to October 31, 1973?

A Yes. I told Dan Overmyer that I would be in New York and pick up that money personally.

Q When did you tell Mr. Overmyer you would be in New York to pick up payment of those notes which are Exhibit "3"?

A Prior to October 31st, and a few days before the 31st he told me not to come to New York because his loan didn't come through and he didn't have

the money, but that we postpone it to the 20th of November when I was supposed to come to New York at that time and settle up with him.

Incidentally, I had two other buildings with him.

Q With Overmyer?

A Yes, in the same situation.

Q The payment of the notes was supposed to be November 20, 1973?

A Correct.

Q Did you comply with Dan Overmyer's request that you delay your trip to New York?

A Yes, I did not come to New York and on the 14th of November I called Dan and told him that I was still planning to come on the 19th and if he would be ready to settle up with me.

He said, "It looks very good", that he was almost sure he could.

Q This was the conversation which you had on November 14, 1973?

November 14, 1973, while the Chapter XI was being prepared?

A That is correct.

MR. PARKER: If Your Honor pleases, I understand the record indicates on November 2, 1973 the Chapter XI was being planned.

Q Were you told anything by Dan Overmyer concerning any intentions to file a Chapter XI?

A No. I called Dan Overmyer on Monday morning, on the 19th of November, at 7:45 A.M. and told him I had my bag packed and I was taking off to the airport at that time.

He said, "Bill, don't come in, we filed Chapter XI at 4:00 o'clock on Friday".

I said, "I am coming in anyway because I am ready to go".

I came in on Monday morning, the 19th.

Q He told you - -

A At that time that was the first time there was any indication.

In fact, I never had any indication of any kind there was any Chapter XI planned at all.

He told me at that time, on the 19th, he told me he filed Chapter XI on the 16th.

Q Sir, on November 16, 1973 what was the amount of principal and interest due on the four promissory notes which have been marked Applicant's Exhibit "3"?

A Well, I had four notes at $6,800 apiece plus interest and I had the October and November payments which would be $6,800 apiece.

Q I - -

MR. PARKER: If Your Honor pleases - -

THE JUDGE: That is about $40,000.

MR. PARKER: The arithmetic would be a little less.

THE JUDGE: I have stopped counting certain owings in this case.

Q Sir, apart from the four notes which have been marked Applicant's Exhibit "3" were the rent payments for the months of October and November, 1973 paid to you by Overmyer?

A No.

Q In addition to what was owed to you in reference of principal and interest on the

four promissory notes you were also owed rent for October and November, 1973?

A Correct.

MR. PARKER: If Your Honor pleases, and off the record, may I refer again to Applicant's Exhibit "2", the lease, which in Section 5.02 provides for the payment of interest on overdue rent at the rate of 7% per annum and doing the arithmetic, which is subject to correction, that amounts to some $13,750 on November 16, 1973 so that as of November 16, 1973 the aggregate arrearages in rent appear to amount to $42,250.

Q Sir, did Overmyer pay the real estate taxes on the Denver property for the year 1972?

A No.

Q When was payment of those taxes due, sir?

A They were due in March of 1973.

Q Had they been paid by November 16, 1973?

A No.

Q They were still outstanding and due after November 16, 1973?

A Yes.

Q They were not paid by Overmyer were they?

A No, they were not.

THE JUDGE: Counsel, if you want to testify, I will swear you.

MR. PARKER: I understand, sir and I will alter in accordance with Your Honor's observation.

THE JUDGE: This is not leading, this is testifying.

Q Sir, do you know what the amount of the taxes paid for 1972 was?

A $22,120 or something in that range.

Q Who paid those taxes?

A I paid those taxes.

Q Were those taxes paid at a date after November 16, 1973?

A I paid those January 4, 1974.

MR. PARKER: Again, in the

interest of time, if Your Honor pleases, I would offer and ask it be marked In Evidence as a single Exhibit a redemption certificate, a credit item of and a receipt of the City and County of Denver, Treasury Division, indicating payment and a stamp indicating that payment had been received of taxes for the year 1972 in the amount of $22,132.58, and I make copies of those documents available to Mr. Sandler and Mr. Lifland, marked as Applicant's Exhibit "4".

(Documents described above were marked Applicant's Exhibit "4" In Evidence, as of this date.)

MR. PARKER: If Your Honor pleases, may I again refer to the lease which is Applicant's Exhibit "2" which in Section 4101 obligates the tenant to pay the real estate taxes relating to the property and related charges.

MR. SANDLER: If Your Honor pleases, the lease speaks for itself.

MR. PARKER: It's In Evidence.

THE JUDGE: I appreciate it. I really don't want to read 200 leases word for word.

Q Mr. Ruple, is the failure to pay real estate taxes an event of default under the mortgage on the property held by you with Life Mortgage Corporation?

A Yes.

MR. PARKER: If Your Honor pleases, again may I refer to Applicant's Exhibit "2" which in Article 12 of the lease obligates the tenant to maintain at its own expense various types of insurance coverage relating to the property.

Q Mr. Ruple, do you know whether the insurance coverage called for by the lease had been cancelled?

A I was notified by the mortgage company that the insurance had been cancelled.

MR. PARKER: Again, if Your Honor pleases, in the interest of time - -

THE JUDGE: I will object. There has been no time fixed, no period of time.

MR. PARKER: I am going to do that. If Your Honor pleases, I was going to offer and ask to be marked In Evidence as Applicant's Exhibit "5" a letter on the letterhead of U.S. Life Mortgage Corporation addressed to Mr. William Ruple and attached to which is the certified mail envelope addressed to Mr. William Ruple in which notice of cancellation of several policies is given by U.S. Mortgage - - U.S. Life Mortgage Corporation.

I ask it be marked as Exhibit "5".

I am making extra copies available.

MR. SANDLER: Your Honor, I would

object to this Exhibit.

MR. LIFLAND: It refers to third party correspondence.

MR. SANDLER: Furthermore, we notice that the Receiver has insurance, Your Honor.

THE JUDGE: That is not the issue.

The issue is whether or not this constitutes an additional breach.

MR. SANDLER: The letter doesn't say anything about breach, it says they have received notice of cancellation.

MR. LIFLAND: It's a February letter and doesn't refer to a time.

MR. PARKER: Some of these facts would be within the knowledge of the clients, Mr. Sandler and Mr. Lifland, in respect of this cancellation and these are facts we don't know - - we don't have and actual facts that are reflected by that letter that Mr. Ruple received informing him of the cancella-

tion of the insurance in respect to that property, that doesn't indicate whether or not it may have been cancelled for a reason other than - -

MR. PARKER: I am prepared to stipulate I don't know the reason - -

THE JUDGE: Or whether or not Mr. Overmyer may have changed companies or so on.

MR. PARKER: If Your Honor please - -

THE JUDGE: I will sustain the objection.

I don't think it makes much difference to this record.

It's not so much it's hearsay, it's not probative of the ultimate reason of breach.

MR. PARKER: With great regret I can't all at once establish that. I will try to do it with the witnesses of Mr. Sandler and Mr. Lifland.

THE JUDGE: Don't be surprised if

if you can't.

MR. PARKER: May I at this time state that that lease called for polices of insurance to provide for notices of cancellation being given to the landlord.

THE JUDGE: Did you ever receive notice from Mr. Overmyer of an intent to have the insurance coverage cancelled?

THE WITNESS: No.

MR. PARKER: You anticipated my question.

Q Do you know the reason for the cancellation, sir?

A No.

Q Have you reinstated any insurance concerning the Denver 1 property?

A Yes, I have put a rider on it before I came down to New York Monday.

THE JUDGE: That has already been covered by the Receiver.

THE WITNESS: Nobody told me

that. I can't have a building with no insurance.

Q Mr. Ruple, would you please tell us whether failure to maintain insurance on the property constitutes a default under the U.S. Life Mortgage Corporation?

MR. LIFLAND: Objection. He asked that already.

MR. SANDLER: Objection.

THE JUDGE: I thought it was a default on the mortgage for non-payment of taxes.

THE WITNESS: That is what it was.

THE JUDGE: You didn't object then?

MR. SANDLER: Maybe I should have.

THE JUDGE: Your objection now is overruled.

Q Could you please tell us whether any mechanics' liens have been filed against the Denver warehouse property?

A Yes.

Q Have you received a statement of mechanics' liens?

A I have received a statement for a mechanic's lien, yes.

Q When was it that you received that statement of a mechanic's lien, sir?

A December.

Q December, 1973?

A Yes, 1973.

Q Sir, I show you a copy of a statement of lien, dated December 14, 1973, which indicates it's filed against the property by Empire Lighting & Supply Co., a material lighting and supply firm, and ask you if that is the lien or statement of lien which you have received (handing)?

THE JUDGE: You better let Mr. Sandler see it.

MR. PARKER: I am handing copies of the document to Mr. Sandler and Mr. Lifland.

Q Do you have the question in mind whether you received that?

A I received this, yes, sir.

Q That is the one you received in December?

A Yes.

MR. PARKER: If Your Honor please, I offer and ask to have marked as Applicant's Exhibit "5" this document.

MR. SANDLER: We object, Your Honor.

THE JUDGE: May I see it.

MR. SANDLER: There has been no testimony nor is there anything to indicate in this statement of lien that the work was ordered by the Debtor.

THE JUDGE: I assume we are going to find out what the work was for and who would be responsible under the lease and so on.

I also assume there must be something in the lease about liens on the property which have to be discharged.

I will overrule your objection

and allow it.

MR. PARKER: Your Honor, may I respectfully point out that in Applicant's Exhibit "2", the lease, Section 6.04 obligates the tenants to maintain the premises free of liens and to discharge any such lien.

May I also, if Your Honor pleases, point out in Applicant's Exhibit "2", Section 6.02, the tenant, Overmyer, is obligated at its own cost and expense to put and maintain the premises in thorough and good and safe order and condition, all buildings on the demised premises.

Q Mr. Ruple, do you know whether the Denver property has been in need of repair?

A It's in need of resurfacing of the driveway, the drive in front of the building; also, the exterior of the building needs paint.

Q Do you know for how long a period of time those conditions have existed requiring that repair work?

A They said they were going to do it when I was inspecting the premises in July of 1972.

Q Sir, has that work been done?

A No.

Q Do you know the cost of the work for the resurfacing of the asphalt paving in front of the warehouse?

MR. SANDLER: I object unless a foundation is laid as to the basis.

THE JUDGE: Let's first find out if he knows anything; then we will find out how, sir.

Q Do you have the question in mind? I can ask it of you again if you don't.

A Go ahead, ask it.

(The question was read back by the Reporter.)

A Yes. An Overmyer representative told me it would cost about $5,000.

Q Which Overmyer representative was that, sir?

A Well, he is no longer with them now, he just left them around the first of the year.

Q Had he had any duties and responsibilities with respect to the warehouse?

A It was his job to keep the thing up.

Q Sir, apart from the surfacing work of the asphalt drives and in respect of the painting of the exteriors of the building, is that the entire exteriors of the building that requires painting?

A Yes.

Q Do you know what the cost of that work is?

A Well, I had between $14,000 and $15,000 and Overmyer had my building in Kansas City painted at that figure and there was a lien put on against that.

In other words, it must be a pretty relative figure.

THE JUDGE: You said it cost $14,000?

THE WITNESS: To paint Kansas City. They put a lien on and I had to pay it off.

THE JUDGE: Haven't we heard it runs $7,500 to $8,000 to paint these

buildings.

Mr. Guy, haven't we been hearing testimony, it seems to me from the time of creation, that the cost of a 20,000 foot building is about $8,000?

MR. GUY: That is right, Your Honor.

THE JUDGE: I just wondered whether or not having heard you 37 times my ears were playing tricks.

MR. LIFLAND: You said it cost $14,000 just to paint?

THE WITNESS: For $14,000 I paid off the painting lien on Kansas City #1.

THE JUDGE: That is 20,000 feet?

THE WITNESS: That is the exact same building as in Denver.

Q Now, sir, have you sent Overmyer a letter notice of termination of the lease which is Applicant Ruple's Exhibit "2"?

A Yes, on November 23rd I sent a letter of my intent to exercise my thirty day option and cancel my lease, cancel the lease with Overmyer.

MR. PARKER: If Your Honor pleases, I offer and ask there be marked as Applicant's Exhibit "6" a letter dated November 23, 1973 which notices the signature of William Ruple.

It's addressed to Overmyer at 201 East 42nd Street and specifically refers to Section 15.01 of the lease dated November 11, 1967 between William Ruple and D.H. Overmyer, Inc. a Colorado corporation.

Q Is this a letter to which you referred as the notice of termination, Mr. Ruple?

MR. PARKER: I am handing copies to Mr. Sandler and Mr. Lifland (handing).

A Yes, this is the letter we wrote.

MR. PARKER: If Your Honor please, I offer and ask it be marked In Evidence, that letter as a notice of termination.

(Document described above was marked Applicant's Exhibit "6" In Evidence, as of this date.)

MR. SANDLER: No objection.

MR. LIFLAND: Let it be noted that the letter is dated November 23rd.

THE WITNESS: That's what I said.

THE JUDGE: Is that to be held against them that they acted quickly?

MR. SANDLER: Well, Your Honor, for one thing, notwithstanding all the alleged defaults throughout the years no termination notice was given until November 23rd, after the Bankruptcy was filed.

That is the relevance of Mr. Lifland's remark.

THE JUDGE: Then I missed that. I was going to ask him if he had done anything on all those defaults.

I suppose you will do it on cross.

MR. SANDLER: I hope to.

MR. PARKER: If Your Honor pleases, may I respectfully point out in respect of Applicant's Exhibit "2", which is the lease, in Section 15.01 there is pro-

vision for providing that the landlord has the right to terminate the lease in the event the tenant files a petition for reorganization or petition pursuant to the Bankruptcy Act.

THE JUDGE: Yes.

Q You have already indicated, have you, Mr. Ruple, in answer to His Honor's question that the square feet floor space of the warehouse is 20,000 square feet, sir?

A Yes.

Q Is that correct, sir?

A Yes.

Q Is there any additional space?

A There is an office in front of the building which constitutes 1,200 square feet.

Q Do you know whether the tenant, Overmyer, has any employee located on the premises in charge of the premises for Overmyer?

A To my knowledge he has not.

THE JUDGE: Do you know who the subtenants are, if any?

THE WITNESS: Yes, I do, I

have an idea.

THE JUDGE: You do?

THE WITNESS: Yes.

THE JUDGE: Is the place fully rented?

THE WITNESS: According to the report I had it is fully rented.

THE JUDGE: To the subs?

THE WITNESS: Yes, and I heard yesterday there is 10,000 feet that is not rented.

I have no contact since the first of the year with the building.

MR. PARKER: I assume there will be no objection to this - - in the course of my conversation with Mr. Sandler yesterday he informed me there is approximately 10,000 square feet which is vacant, and during the year 1973 I believe the entire premises were occupied.

MR. SANDLER: If I might just correct that, in fact, we have new information as of this morning.

Ruple.

We thought it was empty because there was a tenant whose lease had expired who was in possession for the 10,000.

He has now renewed and in effect it's fully rented.

THE JUDGE: I see - -

MR. PARKER: With that information, if Your Honor pleases - -

Q Mr. Ruple, are you aware of the gross rent which Overmyer is supposed to receive pursuant to the subleases which he has at the Denver #1 property?

A Yes.

Q Do you know what the amount is, sir?

A Around $137,000.

Q Sir, did you prepare or have prepared under your supervision a projection of the 1974 cash flow required by the tenant, Overmyer, were he to remain in possession of the premises?

A Yes.

Q Well, sir, let me do this - - is this a schedule of projected 1974 cash flow which you prepared or had prepared under your supervision?

A Yes, sir.

Q Were I to inquire as to each of the items on that schedule, your testimony would reflect each of those items and each of the amounts shown thereon?

A Yes.

MR. PARKER: If Your Honor pleases, I offer and ask it be marked In Evidence as Applicant's Exhibit "7" a schedule of projected 1974 cash flow which Mr. Ruple has just testified to.

MR. SANDLER: I object not only to the Exhibit but Counsel's remarks.

He said this would be his testimony and, furthermore, as I look at the schedule - -

THE JUDGE: I will allow it.

MR. SANDLER: Your Honor, this is not a proper projection. There are extremities here, one time costs and they come in and show we are making $100,000 on each one.

THE JUDGE: Assume if you are

fighting for this property you are going to show it's a profitable one. I will allow it.

MR. SANDLER: This Schedule will come back to haunt us in the Briefs.

THE JUDGE: That's the way it goes in life; overruled.

MR. PARKER: If Your Honor pleases, that constitutes the direct examination . Thank you, Your Honor.

THE JUDGE: Mark as Exhibit "7".

(Schedule of Projected Cash Flow, 1974 was marked Applicant's Exhibit "7" In Evidence, as of this date.)

THE JUDGE: Mr. Ruple, out of pocket, what have you had to come up with?

THE WITNESS: Well, I have had to come up with $43,500. This is up to December 1st, $4,250 times six which is $26,100.

THE JUDGE: That is taxes?

THE WITNESS: That is payments to pay the insurance company.

My mortgage payments - -

THE JUDGE: I am asking you what monies out of pocket have you come up with that should have been under the provision of the lease paid to you by your tenant, Overmyer?

THE WITNESS: Well, $22,000 for the '72 taxes. I picked that up out of pocket. But I still had to make those mortgage payments, too.

THE JUDGE: Supposing, Mr. Ruple it were possible that Mr. Overmyer were to file an arrangement in these proceedings and discharge all of the defaults and absolutely make you completely whole without prejudice to your standing as owner of this property, would you renegotiate a lease with Mr. Overmyer assuming this lease were to be held terminated?

THE WITNESS: If he could furnish a bond he won't go in the sewer again, I would.

MR. PARKER: If Your Honor pleases, may we further reserve on Your Honor's question and at an appropriate time deal with it.

THE JUDGE: It's not too important. Quickly Mr. Sandler. To me this is all a case of dollars.

MR. SANDLER: While Mr. Ruple was testifying on the question of dollars Mr. Garbosa was nice enough to show up.

MR. PARKER: We have Mr. Ruple's check for countersignature which we told you was on the way.

CROSS EXAMINATION BY MR. SANDLER:

Q Mr. Ruple, you testified it was your understanding that Overmyer received $137,000 per year from the subs, is that correct?

A Yes.

Q And the rent under the lease is $82,200 per annum which includes the mortgage, is

that correct?

A Yes.

THE JUDGE: That would represent a substantial increment if I terminate the lease and give you your property back?

THE WITNESS: Yes.

Q Taxes are about $22,000?

A The taxes for '72 - - you have the figure right in front of you.

THE JUDGE: They are $20,000 odd thousand?

THE WITNESS: That is '72 taxes that were not paid.

THE JUDGE: The fact of the matter is if I were to return your property to you you would realize a net of some $20,000 odd thousand which is basically what Mr. Overmyer makes from his subtenants in excess of what he should pay under the lease, is that so?

THE WITNESS: Yes.

THE JUDGE: Don't be offended by it. Mr. Sandler acts as though it's illegal to try to make money.

We don't all seelife this way. Go ahead.

MR. SANDLER: May I point out to the Court that this lease has four five year renewal options and that the expired term plus the renewal options give the lease occupancy some thirty-seven years.

THE JUDGE: All at the same rental; none of those declaimers?

MR. SANDLER: You have a flat rent for thirty-seven years.

THE JUDGE: Okay.

Q Mr. Ruple, what business are you in, sir?

A I am an investor.

THE JUDGE: Is that a dirty word?

MR. SANDLER: I think it's an excellent word; I respect it and I am

sure Mr. Ruple is highly qualified.

THE JUDGE: I take it, "D.H." in the content of this case means "Dirty Hand" Overmyer.

This is not the best of your records, Mr. Sandler.

MR. SANDLER: I haven't even started. I can go quickly.

Q Do you own other real property?

A Yes.

Q Where?

A I own a building in Kansas City that Overmyer gave back to me; I own a building in Tampa, Florida they gave back to me.

THE JUDGE: Are you considered a successful man?

THE WITNESS: I had to be successful to buy those buildings.

Q Did you negotiate those buildings personally with Overmyer?

A Yes.

Q Who did you deal with at the Overmyer office with respect to those?

A George Hays and a man - - first there was a Dale something; after - - that brought George Hays into the picture.

Q The rent under the lease is $82,200; the mortgage is $52,200 which leaves $32,000 per annum from the rent?

A Yes.

Q You testified you invested $300,000 in cash to purchase the property?

A Correct.

Q The $30,000 is ten percent of the $300,000?

A Correct.

Q When you negotiated this deal, did you negotiate for a ten percent return on your cash investment?

A Yes, sir.

THE JUDGE: Did you also take into account the tax shelter that you would receive?

THE WITNESS: I didn't pay attention to that. The reason I bought these buildings is I sold another

business and wanted to get into a business that didn't require work.

That's why I bought the buildings.

Q In other words, as I understand your remarks, Mr. Ruple, you did not intend to have to become involved in the operation of the warehouses, is that correct?

A Definitely not.

Q At the time you purchased this warehouse it was leased by Overmyer to subtenants?

A Correct.

Q Those subtenants remained as tenants of Overmyer notwithstanding the fact you purchased the building; you desired and acquired a passive situation of collecting monthly checks, is that correct?

A That is correct.

Q You testified that Overmyer was late, I think you said, about a month at the very beginning?

A Yes.

Q For the years 1969, '70, '72 and '72, at $82,200 you have received, have you not,

from the Overmyer Company $328,000?

A If that's the figure that is what I received.

Q And all of those payments were paid late, is that correct?

A Correct.

Q You accepted all these late payments?

A Yes, I accepted them, but we gave them - -

Q Did you complain?

A I used to call Dan up at a quarter to eight in the morning.

Q Did you ever terminate the lease because of those late payments?

A No.

Q You testified that the building needs repairing and you had a conversation in 1972 about the need to make repairs, is that correct?

A Correct.

Q Did you ever send a notice of termination because those repairs were not made?

A No.

Q Prior to your November 23rd notice

of default, did you ever for any reason send Overmyer a termination notice?

A I had several conversations with Dan about it and he always talked me out of it because he was going to get a big loan and take care of everybody.

Q Was he going to get this loan in 1968?

A No.

Q He was late in 1968?

A Yes.

Q Was he going to get the loan in 1969?

A No.

Q He was late in payments in 1969?

A Yes.

Q He was the same for '70, '71 and '72?

A Okay.

Q When you entered into this lease, the original terms plus the renewal options ran a total of forty-five years, is that correct?

A I guess so, whatever it comes out to.

Q What did you know the life expectancy of this building to be?

A Basically, as long as I lived; no, I didn't care.

Q Let me see if I can get an answer to that question.

Didn't you understand that this building only had a life expectancy of forty to fifty years at the most?

A Yes.

Q You knew that if Overmyer stayed in possession, exercised his rent and paid his rent, exercised his renewals to the time the lease expired, you would, in fact, have no building, you would have land?

MR. PARKER: If Your Honor please, I think the question is faulty.

MR. SANDLER: A building doesn't last forever.

If you give it away for fifty years - -

THE JUDGE: I don't know what

real probative value it is; I don't know that buildings don't last forever and fifty years is not forever.

I see buildings all over the place that are hundreds of years old that people are living in.

One more minute to this line, Mr. Sandler.

Apparently in the understanding of the Receiver it is illegal and nasty; nothing in this country is nasty except people who want to make a buck.

What was Overmyer here as a philanthropic institution; what was he doing?

The only ones who are nasty for wanting to make profits are lessors; Overmyer is a hero and the money he is going to make on subs is - -

MR. SANDLER: We are fighting for the Receiver not for Overmyer.

THE JUDGE: Let's get on to legitimate cross examination.

At this time I am turned off. Apparently there is something prejcrative by a man who wanted to make some ten percent on his money.

You have one minute to cross examine. This is a Court of Equity; you must think equity. Let's go.

MR. SANDLER: I have no further questions.

MR. PARKER: I have no further questions.

THE JUDGE: Mr. Lifland, do you have anything to add?

MR. LIFLAND: No.

THE JUDGE: Your next witness.

MR. PARKER: I don't have another witness.

THE JUDGE: You rest?

MR. PARKER: I rest. My case is finished.

THE JUDGE: Mr. Sandler, do you think we can dispense with Mr. Flanagan?

MR. SANDLER: I offered to stipulate if Mr. Parker would stipulate.

S A M H. F L A N A G A N, Called as a witness, having been first duly sworn by the Judge, was examined and testified as follows:

EXAMINATION BY THE JUDGE:

Q What is your full name?

A Sam H. Flanagan.

Q Where do you reside?

A 2 Chester Road, Darien, Connecticut.

EXAMINATION BY MR. SANDLER:

Q Mr. Flanagan, are you presently employed by the Receiver?

A Yes.

Q In what capacity?

A The area of rent collection and marketing.

Q Prior to such employment, were you employed in a similar capacity by the Debtor?

A Yes.

Q Do you keep records in the ordinary course of business indicating collections from sub-tenants at various warehouses?

A Yes.

Q Do you have records indicating the collection of rents from subtenants at Denver #1?

A Yes.

Q To the best of your knowledge acquired from your position with the Receiver, previously with the Debtor, can you tell us what the Receiver presently collects from subtenants at the Denver #1 and who those subtenants are?

A Well, the present rent roll in Denver #1 consists of Vogue Furniture.

MR. PARKER: Your Honor, may I ask that the witness speak up a little more than he has been.

THE JUDGE: Well, he is doing the best he can. Just a little more decibels.

A Vogue Furniture, $3,666 a month. Friendly Markets, $3,666 a month; Purcell-Karp Distributors, Inc. $2,213.54 a month; Jorgis Carpet Mills, Inc., $900.00 a month; and Ben Comer Sales Co., $1,031.25, for a total of $11,456.79.

THE JUDGE: That building yields something in the vicinity of $140,000 gross.

THE WITNESS: Yes, sir.

Q Mr. Flanagan, on a monthly basis what is the gross profit?

By that I mean, the difference between what is paid to the landlord for rent and taxes and what is collected from the subtenants?

A The gross is $2,909 a month or $35,000 a year, approximately.

THE JUDGE: That is one of the better jewels in the Overmyer dynasty?

THE WITNESS: It is a good one, yes, sir.

MR. SANDLER: I have no further questions.

THE JUDGE: One minute. Don't think I am arbitrary, but I have heard this forty times and virtually nobody has been able to impair the testimony as to what those figures add up to.

MR. PARKER: May I respectfully say, if Your Honor pleases, I consider the testimony completely inadequate and to the point - - I will reserve it for argument, if I may.

THE JUDGE: I will allow you to cross examine.

EXAMINATION BY MR. PARKER:

Q In arriving at your gross profit figure, are there any other items which are normally taken into account in computing profit other than the items to which Mr. Sandler referred to?

A The only two items - -

Q Can you answer my question yes or no?

A Would you repeat it for me?

Q Yes, I would be happy to - -

MR. SANDLER: If Your Honor please - -

THE JUDGE: Can I hear the question.

MR. SANDLER: I just want to give some of the ground rules that have

developed here.

THE JUDGE: The question is, can you answer it yes or no?

MR. SANDLER: We will concede it.

MR. PARKER: Mr. Sandler, there are other items - -

MR. SANDLER: Mr. Guy will testify as to construction and maintenance costs.

MR. PARKER: I think I have enough for the purpose of the record.

THE JUDGE: Perhaps I am remiss for not having explained to you what has gone on since time began.

THE WITNESS: Number one, we have to understand the figure is a gross figure.

Against that we entrench on that to the extent of insurance. The Receiver will testify he placed insurance which averaged out to $150.00 per property.

We are trenching on this property

to the extent, as Mr. Guy will testify, there is a national allowance of two cents per square foot per year for average routine maintenance which does not comprehend face-lifting like painting or some big massive repairs.

Now, beyond that these are the figures thus far.

We have been told, that reduces the gross to a net. You can go on beyond that.

THE JUDGE: Are there any other items?

THE WITNESS: Administrative, there will be testimony one day here soon as to what portion of the national budget of the parent company is allocable to each of its properties which will further reduce the top line gross figure to a net figure.

MR. PARKER: All right. May I just take that minute offered me before?

THE JUDGE: Go ahead.

EXAMINATION BY MR. PARKER:

Q Mr. Flanagan, how long have you been familiar with this Denver #1 property?

A It came under my supervision early in December.

Q Of 1973?

A Yes.

Q Prior to that time had you ever visited that property?

A No, sir.

Q Since that time have you ever visited that property?

A No.

Q You have never seen that property?

A No, sir.

Q Have you gotten any information concerning the property?

A Yes.

Q From whom?

A It would be a variety of sources, sir. The latest would be Bob Schmitt.

Q None of your own personal knowledge; all of the information you have gotten you have ob-

tained from others?

A And from the records.

Q What records are you referring to?

A The records that were formerly maintained by Overmyer and the - -

Q How far back does your examination of those records go?

A That that I speak about this morning would be the leases that are currently in existence.

Q Sir, can you explain any reason for the failure of D.H. Overmyer Co., Inc., a Colorado corporation, for failing to make rent payments, based upon your computations of gross profit?

MR. SANDLER: Objection, this witness is testifying as to current collections.

THE JUDGE: I will allow it. Do you have any reason or knowledge, or understanding, what might have caused this?

THE WITNESS: That is out of my domain.

MR. PARKER: Thank you, that is my cross examination.

MR. SANDLER: Thank you, Mr. Flanagan.

THE JUDGE: Your next witness.

M U R R A Y G U Y, Called as a witness, having been first duly sworn by Hon. Roy Babitt, was examined and testified as follows:

EXAMINATION BY THE JUDGE:

Q What is your full name?

A Murray Guy.

Q Where do you reside?

A 74 Briar Brae Road, Stamford, Connecticut.

EXAMINATION BY MR. SANDLER:

Q Mr. Guy would you state your professional qualifications and educational background?

A I am a graduate engineer and spent eighteen years in engineering, construction maintenance, sixteen years with Pittsburgh Plate Glass Company directing maintenance and technical assignments; and ultimately managing their construction program world-wide for five years; and I spent one year with

Albert C. Martin & Associates, an architectural and engineering consulting firm in Los Angeles directing industrial development and engineering work; and one year with D.H. Overmyer Company.

Q Are you presently employed by the Receiver?

A I am.

Q In what capacity?

A In the capacity of maintenance, construction and engineering.

Q Previously you were employed in a similar capacity by the Debtor?

A Yes.

Q Based on your employment by the Debtor and the Receiver in connection with routine maintenance of the various Overmyer warehouses, were you able to arrive at an average per square foot cost for such routine maintenance?

A Yes, we have. We use a figure of two cents per square foot for continual maintenance.

Q Can you tell us based on your knowledge or any records in your possession whether the Denver #1 warehouse requires any work which is

not encompassed within what you describe as routine maintenance?

A Yes. Let me explain it this way. We are missing a few dock bumpers on that building, the building itself is in reasonably good shape; the paving area we found that our paving doesn't hold up in Denver very well.

THE JUDGE: Why don't you change your style of paving?

THE WITNESS: That costs additional money, Your Honor. Anyway, when we re-evaluated the facts we should pave the Denver #1 building we were not maintaining the pavings as paving but we did gravel the area and this really has been better for us, not for the owner, because we have had lease maintenance and have not had complaints.

It's better to have a gravel surface and maintain it than a bunch of chuch holes.

Q When was the last time gravel was

put down?

A That was a continuing thing. The asphalt has deteriorated, it's not in its original shape.

THE JUDGE: May I start with another question. What do you estimate it would take within your budget to bring the place up to snuff within the ordinary expectancy of what the two cents covers?

THE WITNESS: Your Honor, we had only had a $2,100 budget for that job because we were going to live with the gravel situation.

The warehouse is very tough to use there and we had considered painting the building.

THE JUDGE: Are there problems outside this budget of yours, outside that figure - - extensive roof problems, door problems, drainage?

THE WITNESS: No, our records showed that paving was considered and not done and on our program it was not

one of the buildings to be painted.

THE JUDGE: What would it cost to pave in keeping with what the Denver climate's particular conditions would support?

THE WITNESS: That property would cost $12,000 to $13,000 to pave it and do it right.

THE JUDGE: Do it properly?

THE WITNESS: Yes, sir and that would be four or five thousand more than what we normally put into a paving job say in Texas or Miami.

THE JUDGE: Now, is it your testimony that your two cents a foot budget predictably will cover the needs of that property excepting for any big jobs such as the repaving?

THE WITNESS: Yes.

THE JUDGE: You are putting all of that into maintenance of the gravel, is that what you said?

THE WITNESS: You - - There you

are talking where you might only put in $1,000 a year.

That would be very high, in fact.

THE JUDGE: Go ahead Mr. Sandler.

EXAMINATION BY MR. SANDLER:

Q Since you put the gravel in which, I take it, was a substi tute for repaving, have there been any complaints from subtenants, to your knowledge?

MR. PARKER: Objection, what difference would it make whether there were complaints or not?

A None I am aware of, I have not heard any.

Q Do you know of any?

A I don't know of any, no.

THE JUDGE: Do you use gravel in any other warehouse in the country in lieu of fixing potholes and cracks?

THE WITNESS: Yes. I don't know the building number, but in

Minnesota.

THE JUDGE: Similar type of climactic situation?

THE WITNESS: Minneapolis, Minnesota #1 or #4.

Q Mr. Guy, you were in Court when Mr. Ruple testified previously about a paint bill for another warehouse, not Denver #1, another warehouse in the number of approximately $14,000?

A Yes.

Q Are you familiar with that bill and how Mr. Ruple arrived at that number?

A Yes, and I tried to negotiate terms with the painting contractor, Allman Painting, to satisfy those problems.

I don't know how many buildings he owns there, but we let a contractor paint Kansas City #1 and Kansas City #3.

The base cost for paint was $10,650.00 and that is per building and an additional $5,000 for gutters, downspouts, and $3,000 for carpenter door work, and so on.

If you divide it by two, we were putting

about $14,500 into each building.

THE JUDGE: It's not just painting?

THE WITNESS: No, and as a substitution, or whatever you want to call it, they had the painting contractor subcontract the carpenter work and subcontract the sheet metal work so it would look like he had an expensive paint job, but it was a means of circumventing additional approvals.

But, there was an all inclusive upgrade of the property in construction and beautification of the building itself.

Q Coming back to Denver #1, if you decided to paint Denver #1, could you tell us what the approximate cost of that job would be?

A Well, forgetting three particular buildings in our program of fourteen buildings - - Kansas City #1, Kansas City #3 and Portland #2, our average building cost to paint was held at $6,900 and we only had two that ran over $7,200, and I mean these

are actual contractor prices.

The last two buildings that we painted were in Memphis, contracted from a Hartford contractor to do business in Memphis.

We paid him $15,750 to do two buildings and I think that really is the norm for what we discussed.

THE JUDGE: But is it your testimony that the Denver #1 is not yet in the cycle of repainting?

THE WITNESS: No, it was never on the list of some forty buildings of which we painted about twenty of them.

MR. SANDLER: I have no further questions.

EXAMINATION BY MR. PARKER:

Q Mr. Guy, do you know whether the Denver #1 building was ever painted?

A No, I wouldn't know that.

Q Do you know the age of the building, sir?

A To the exact month?

Q No, approximate.

A Five years.

Q You heard testimony that this building was purchased in November, 1967, did you?

A I can give you a completion cost. No, I wasn't paying attention.

Q But, your understanding is that that building has only been in existence for five years?

A I thought so. I could verify that in two minutes.

MR. PARKER: Would you do so?

THE JUDGE: Does it really matter?

MR. PARKER: I think it matters on the testimony for need of painting.

THE JUDGE: When the buildings get turned over, are they painted at that point?

THE WITNESS: Who said no?

MR. SANDLER: Mr. Ruple.

THE WITNESS: They better be, our specifications are that the buildings

if not brick are painted.

THE JUDGE: Do you know whether or not the Denver property was painted at the time it was turned over to Mr. Ruple?

THE WITNESS: I don't know that. I had Denver #4 out instead of Denver #1. I can't really tell like this.

It looks like we entered into a land agreement in November of 1965.

It takes about a year, year and a half to build the building.

I can see occupancy in 1967. I don't have an answer to that question; I don't know how old that building is.

Q Now, sir, in respect of the Kansas City property about which Mr. Sandler inquired, approximately one half of the work done was done under subterfuge, was it, and represented as painting work - -

MR. SANDLER: Objection to the word, "Subterfuge".

THE JUDGE: That is what he stated.

THE WITNESS: I will regroup my wording then.

The total job to paint two buildings, repair all doors in the buildings, put new gutters and downspouts and leaders where needed was $29,000 and a few bucks.

Q What part of that was subterfuge, sir?

A The subterfuge that I am saying is we normally don't have a painting contractor do carpenter work and sheet metal work because your painting overhead - - you are paying him a handling cost of at least five percent.

Q The painting contractor was the one who filed the lien, is that right?

A Yes.

Q That lien was never discharged by Overmyer, is that right?

A No.

MR. SANDLER: Your Honor,

Counsel is not letting the witness finish his answer.

THE JUDGE: I don't find any importance to this cross. I am interested in Denver #1.

MR. PARKER: I understand, Your Honor.

Q Did you, Mr. Guy, have anything to do with the negotiation of that work with that painting contractor including the subterfuge work?

A I did not.

Q You learned of it how?

A I had to pay the bill.

Q Did you pay that bill?

A I couldn't believe that we issued the work at those costs.

Q This was for Overmyer, is that right?

A Yes.

Q Have you ever seen the Denver #1 property, sir?

A No, I have not.

Q Never examined it in any way?

A No, I have - -

Q The exterior of the building you have not examined?

A No.

Q Your testimony is not based upon an inspection of the need for any painting work?

A No.

Q Your testimony is not based on any inspection of the paving area which is now covered by gravel, is it?

A No.

Q Did Overmyer ever give notice to Mr. Ruple of the fact they were now covering the paved area with gravel?

A I would not know.

Q Do you know whose responsibility it would be within the Overmyer organization to give such notice?

A No, I don't.

THE JUDGE: Was it your responsibility to authorize this as a means instead of resurfacing?

THE WITNESS: The local manager

and I discussed it and with him living there and operating there indicated that this would be the most satisfactory work from a business standpoint way to do it, and I couldn't disagree.

Q He told that to you?

A Yes, sir.

Q Your judgment was not a judgment based upon any personal knowledge except what was said to you, is that so?

A This was long after it happened.

Q Can you answer my question whether or not - -

MR. SANDLER: If you will give him a chance.

THE JUDGE: Read back the question.

(The question was read back by the Reporter.)

THE JUDGE: Can you answer that yes or no?

THE WITNESS: I did not make

a judgment.

Q The action that was taken was not based upon any personal knowledge you had, was it?

A No.

Q Sir, how long has this gravel substitute been in use at the Denver #1 property?

A The information or the knowledge I have is pretty much after the fact and I wouldn't know when they started doing it.

Q Prior to the time that this gravel substitute was used, there had been an asphalt paved area was there not, or don't you know, and you don't have any personal knowledge, do you?

MR. SANDLER: That is two questions.

THE JUDGE: At least two.

MR. PARKER: At least three.

THE JUDGE: I will sustain the objection as to form.

Q Do you of your own personal knowledge know, sir, what the material was that covered the drive area at the front of the warehouses?

A The specifications for the building calls for asphalt and we paid for asphalt.

I have never seen it.

Q These specifications are not the engineering specifications for Denver #1?

You know it shows - - you know it's those same specifications that are the specifications on which Mr. Ruple purchased the property?

A I would sure believe that.

Q Now, sir, do you know whether the person, whoever he was, who recommended that gravel be used is any longer employed by Overmyer?

A He is not employed by Overmyer.

Q Do you know whether anybody has been substituted in his place, sir?

A I do not know.

MR. PARKER: Now, Your Honor, that is the cross.

THE JUDGE: Mr. Sandler.

EXAMINATION BY MR. SANDLER:

Q Mr. Guy, what would it cost to rebuild Denver #1 today?

MR. PARKER: If Your Honor

pleases, this is entirely new; it was not brought out on direct; I did not go into it on cross.

I don't believe it's proper redirect.

THE JUDGE: I will allow it.

Q In other words, my question is on a 20,000 square foot warehouse in that area of the country exclusive of land costs, could you, based on your engineering experience and your familiarity with the Overmyer warehouses, give us an approximate per square foot cost of construction?

MR. PARKER: I don't believe the competency of this witness has been established in this respect.

THE JUDGE: I will take it for whatever it's worth.

MR. PARKER: I also add the ground of relevancy.

THE JUDGE: It may not be material. It goes to the ultimate decision of this Court on the ultimate exercise of its judgment. You don't

have to answer if you can't.

A We know pretty much what they cost all over the country. Assuming a reasonable site development cost it would be about $8.50 to $9.00 a foot.

Q That would be exclusive of land?

A Exclusive of land.

Q Do your records indicate how much land is involved for the Denver #1 warehouse, how many acres?

THE JUDGE: Does Mr. Ruple know?

MR. RUPLE: About seven acres, between six and seven.

THE JUDGE: Let the record show that Mr. Ruple, the Plaintiff in these proceedings is responding to the Court's question.

EXAMINATION BY THE JUDGE:

Q Mr. Guy, can you tell us the general procedure in the office, by that I mean the Debtor and now the Receiver, pursuant to which you acquire information concerning the maintenance

problems with regard to area warehouses where you do not personally visit the warehouse?

MR. PARKER: This would not be binding upon us; this is the internal operation.

I don't know that it has anything to do with the inquiry.

THE JUDGE: That is true.

MR. SANDLER: On the cross.

THE JUDGE: Answer?

A At the present time I have three prime sources for referring information on property, one local agents that are now working in the areas, which is relatively new; two; directly from the subtenants in many cases or from the tenants in the case of our fee buildings; and by my personal inspection wherever I can go, and by letters through Attorneys that are representing those people highlighting these items.

I guess there's five or six sources.

MR. PARKER: If Your Honor pleases, I respectfully move to strike the witness' answer as completely ir-

relevant, having nothing to do with the matter at issue.

THE JUDGE: Overruled.

Q Prior to the appointment of the Receiver, were there any other employees of the Debtor under your supervision who visited Denver #1?

A Yes, when I had approximately ten or eleven full time maintenance employees that would travel to the different warehouses, the different areas making repairs.

At the same time there in the Exhibit, like at Denver, if they were working on Denver #4 they would probably check #1 and #3, or Chicago.

They also would inspect the buildings in the vicinity at the time they were called in to do repairs and the one individual manager, it was his job to pass judgment on maintenance, repairs, and help prepare the maintenance budget.

Q Were these other individuals formerly employed by the Debtor under your supervision?

A Yes, they were.

Q Would they report to you?

A Yes, they would.

Q Would they report to you originally?

A All originally, but every other week we attempted to have discussions or written reports and once a month a monthly status report.

Q In giving your testimony with regard to Denver #1, have you relied upon all of these sources?

A Yes, I have.

MR. PARKER: If Your Honor please, what sources?

MR. SANDLER: The witness testified to five or six sources.

THE JUDGE: I think the record will show what he personally knew of Denver #1 and I think I may take notice in an empire such as this was, the head of the pyramid would get his information from a number of sources.

I will overrule the objection.

MR. SANDLER: I am finished.

THE JUDGE: Next witness.

MR. SANDLER: I have no further questions.

MR. PARKER: Baker, Noestedler have originally appeared in this. At the request, we have taken this case.

My name is Irving Parker from Jacobs, Persinger & Parker.

THE JUDGE: The thing I want to remind you of is there will be a time very shortly when we are going to fill on up the last gaps in this testimony, namely, the Receiver's testimony as to how much is allocated to overhead which reduces the gross profit of Overmyer.

There will be a right of cross examination. You will be informed as will everybody else.

I hope to have tried all of the actual litigation by the end of this month because I want to decide this case certainly by the end of April.

I feel I don't want to deny justice by reserving decision.

You will be kept informed.

MR. PARKER: If Your Honor pleases, we have prepared but will withhold the submission of a Memorandum of Law which we hope would satisfy Your Honor in deciding this.

THE JUDGE: You may want to compliment it by a post-trial memo.

MR. PARKER: If Your Honor will not be getting to it, I shall.

THE JUDGE: Frankly, I started my research on the legal principles.

Frankly, my judgment is going to turn on a good mixture of the legal and equitable facts.

MR. PARKER: That being the case, I respectfully submit this.

THE JUDGE: If you feel that a post-trial memo on the facts adduced today will be of any assistance, feel free to do so.

MR. PARKER: As soon as we get the transcript we will.

Thank you, Your Honor.

THE JUDGE: Mr. Ruple, thank you for coming up.

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F 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

In the Matter
of

D. H. OVERMYER,

Debtor.

No. 73 B 1131

United States Court House
Foley Square, New York, N.Y.

January 23, 1974
4:00 o'clock p.m.

LANDLORD'S MOTION FOR POSSESSION - DENVER 4 -
HAHN, HESSEN, MARGOLIS & RYAN, ESQS.

Before:

HON. ROY BABITT,
Referee In Bankruptcy

BARRY W. RAYVID
Official Court Reporter
U.S. Courthouse (R. 230)
Foley Square, New York, N.Y. 10007

A P P E A R A N C E S :

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BY: EDGAR H. BOOTH, ESQ., Of Counsel
-and-
WILL B. SANDLER, ESQ., Of Counsel
-and-
MICHAEL KLEINERMAN, ESQ., Of Counsel

MR. DANIEL H. OVERMYER,
President of the Debtor

- - - - -

PROCEEDINGS

MR. ZIMMERMAN: Your Honor, I have here a request for admission. All admissions have been affirmed by the debtor and receiver with the exception of request number 19.

I do not believe Your Honor has the answer before you and I think that - -

THE REFEREE: Yes, I do, I have the answer. They don't seem to have denied allegation 19.

MR. ZIMMERMAN: The answer of the debtor does and the receiver has adopted it.

THE REFEREE: Right, you are.

MR. ZIMMERMAN: I would like to mark in evidence, an exemplified copy of the pleadings in an eviction action in Denver, Colorado.

MR. SANDLER: This is a pending action?

MR. ZIMMERMAN: A pending action stayed by this Court.

MR. SANDLER: I object as to relevancy.

THE REFEREE: That an action was commenced?

MR. SANDLER: Look what it does to our record. What is the relevancy? We know actions were started in most of the states. Why bring in all of the pleadings?

MR. ZIMMERMAN: There are admissions contained in that record - -

MR. SANDLER: It's your complaint.

THE REFEREE: Where is the answer? That's all I am interested in.

MR. SANDLER: Maybe we will stipulate the admissions. Your Honor, in the first paragraph of the answer they deny the plaintiff's allegation that they are the owners.

MR. ZIMMERMAN: Are we going to let it go into evidence or not?

MR. SANDLER: In the interest of time, we will allow it in.

(At this time, the said document was so marked in evidence as Applicant's Exhibit "1".)

MR. SANDLER: Will the record indicate that Mr. Zimmerman agreed to supply me with a copy of this within a week.

MR. ZIMMERMAN: Within a week, yes, sir.

That concludes the applicant's affirmative case.

THE REFEREE: What does it mean when they say they lack sufficient information to admit or deny the facts?

MR. ZIMMERMAN: That means that the receiver hasn't had the time or inclination to dig into its records to find out and make a decision as to whether or not - -

THE REFEREE: What is the legal affect of it in the face of your requests for admissions?

MR. ZIMMERMAN: Your Honor, they say they will adopt the answer of the debtor if the debtor files one.

MR. SANDLER: The debtor admits everything except 19. We adopt that.

MR. KLEINERMAN: Your Honor, paragraph one of receiver's response adopts the debtor's response.

THE REFEREE: I don't have the debtor's response.

MR. LIFLAND: Yes, you do. The debtor is admitting everything except 19.

MR. ZIMMERMAN: Your Honor, I now rest on my affirmative case. I would like to make a motion.

I would like to move to dismiss the affirmative defense in this case on the grounds that the Court is without jurisdiction to give the receiver and debtor the relief requested.

The admissions before the Court show that the debtor failed to make rental payments when due, that these were the bases for defaults.

THE REFEREE: Your application is denied on the authority, among others, without extensive study of Lane Foods and Judge Judd's decision in the Queens Boulevard liquor case submitted to me, and in my re-reading them and considering the law of the circuit.

If you would like, I will reserve decision until I decide the whole ballgame. That goes to the very essence of the trials, the equity power of the Court to keep debtors alive where its whole business is subject to

dissipation if you prevail. I require no further argument on that.

MR. SANDLER: My first witness would be Mr. Flanagan, unless Mr. Zimmerman wants to stipulate.

MR. ZIMMERMAN: I will stipulate that Mr. Flanagan was an employee of Overmyer and has knowledge of what he is going to testify to.

THE REFEREE: What did your witness from Cleveland have to testify about?

MR. ZIMMERMAN: Your Honor, he is a rebuttal witness here on issues of damages to the property unless their affirmative case is going to admit what the damages to the property are.

MR. SANDLER: What damages, the need for repairs?

MR. ZIMMERMAN: The need for repairs and maintenance. Also, on the question of the - -

THE REFEREE: That's your rebuttal case to their appeal on my equitable conscience.

MR. ZIMMERMAN: That is exactly right, Your Honor.

THE REFEREE: How many cases do you have, Mr. Zimmerman?

MR. ZIMMERMAN: Seven.

THE REFEREE: What is on today?

MR. ZIMMERMAN: This one and the order to show cause from Monday, which was adjourned to today in regard to this same client.

MR. LIFLAND: Your Honor adjourned only that one. All the rest are on on February 11th.

THE REFEREE: When was that on for?

MR. LIFLAND: That was put on on February 9th.

MR. ZIMMERMAN: Your Honor, could I make a request?

THE REFEREE: No.

Off the record.

(Discussion off the record.)

MR. ZIMMERMAN: My request is I have an issue - - I have served a subpoena duces tecum on the receiver. I don't see any of

the records I subpoenaed here. I want to ask that the records be brought in - -

THE REFEREE: I understand a subpoena has been directed to you by Mr. Zimmerman's firm for the production of records?

MR. HERZOG: Yes, Your Honor. I asked my counsel on the return date to move to quash the subpoena because it was too broad.

THE REFEREE: This is the return date.

MR. ZIMMERMAN: The return date was over a week ago.

THE REFEREE: Has a motion been made?

MR. ZIMMERMAN: No motion was made.

THE REFEREE: Your counsel has apparently not deemed it necessary.

MR. HERZOG: They have been busy. Secondly, the fact that the necessary subpoena fees were not delivered with the subpoena. I think the subpoena itself is broad and onerous on the face of it.

He asks for not a single dated item, he asked for all correspondence, memoranda, records, not limited to letters, telegrams, notices, computer printouts, ledgers,

journals, bills, invoices.

THE REFEREE: He is practicing.

MR. HERZOG: I will be glad to bring the Overmyer office to the court house.

THE REFEREE: I think we have a better idea.

MR. ZIMMERMAN: I only want the information relating to Denver 4 which I would get if I had an opportunity to get a notice to produce.

THE REFEREE: Are you party to the stipulation to get the payments from the subtenants and pay your people?

MR. ZIMMERMAN: No.

THE REFEREE: You are not party?

MR. ZIMMERMAN: No.

THE REFEREE: You really don't want to be a party?

MR. ZIMMERMAN: In this particular case, no.

THE REFEREE: Why?

MR. ZIMMERMAN: Because the client, Denver counsel, says no.

THE REFEREE: I think I have an

answer for Denver counsel. I am going to let you take depositions and get your discovery under the federal rules.

MR. ZIMMERMAN: I did not ask for a deposition, I asked for a production.

THE REFEREE: The subpoena is entirely too broad.

MR. ZIMMERMAN: Then strike the subpoena.

THE REFEREE: All right, the subpoena is now struck. What time do you want to start?

MR. SANDLER: Any time you say, Judge.

THE REFEREE: Ask Mr. Flanagan the usual questions.

Mr. Flanagan, you are still under oath.

S A M U E L H. F L A N A G A N, having been previously duly sworn by Honorable Roy Babitt, was examined and testified further as follows:

DIRECT-EXAMINATION BY MR. SANDLER:

Q Mr. Flanagan, based on the records of

the company in your possession, can you tell us what the receiver presently earns per month on this property?

A Yes.

THE REFEREE: Not what he earns, what is called for under the instrument.

Q What the difference is between what is received from sub-tenants and what is paid out to the landlord for rent and taxes?

A The rent income is twelve thousand one hundred two dollars per month; paid out in rent is sixty-eight hundred dollars; the allocation for taxes is seventeen hundred two dollars; for a total of eighty-five hundred two dollars which gives a difference of thirty-six hundred dollars.

Q Thirty-six hundred dollars per month?

A Per month.

Q Which would be roughly, annually, forty-three thousand two hundred dollars?

THE REFEREE: Twelve times that.

Q That does not take into account insurance of one hundred fifty dollars a month as the receiver has testified to, that this Court has taken notice of?

A Yes.

MR. ZIMMERMAN: I object to his leading the witness. If he wants to ask him what is not in the figures, let him.

THE REFEREE: Is it a fact, Mr. Flanagan, that is a gross figure?

THE WITNESS: That is correct, a gross figure.

THE REFEREE: It doesn't consider insurance, maintenance, or anything else, it is strictly under leases and sub-leases?

THE WITNESS: Yes.

MR. SANDLER: No further questions.

CROSS-EXAMINATION BY MR. ZIMMERMAN:

Q Mr. Flanagan, what records do you get this information from?

A It basically came from the lease document. This was the original source.

Q Which lease document are you talking about?

A It would come from both lease documents which would be the lease document with the owner of the property and Overmyer as to the costs, the taxes, the tax allocation, and with the leases with the sub-

tenants as regard to the revenues.

Q Are utilities covered by these leases?

A This particular premises is totally sub-leased. There are no utilities - - no utility charges for which Overmyer is obligated.

Q Have you read these leases personally?

A Not all of them, no.

Q Have you read the lease between Wolfberg and Overmyer on these premises?

A No.

Q Have you read the leases between Overmyer and the sub-tenants in this case?

A I haven't read all of them.

Q Which ones have you read?

A I read the one with Albertson.

THE REFEREE: How do you get the figures?

THE WITNESS: The figures are maintained in the marketing department by an individual that's responsible for the figures and record-keeping of these leases. The numbers that I get are derived from this source.

MR. ZIMMERMAN: Just for the record, I will make a motion to strike his testimony

as hearsay. No foundation was laid.

THE REFEREE: Overruled.

Q Mr. Flanagan, did you testify your main area of responsibility was sales?

A Today?

Q Today.

A My area of responsibility is sales, marketing, and collection of rents.

Q What is the market in Denver for warehouse space today?

A The market in Denver for warehouse space today would be in the area of one dollar and twenty-five cents a square foot.

Q I don't mean that. I mean if one of the tenants moved out, how quickly could you replace him?

MR. SANDLER: Objection, it goes beyond direct.

THE REFEREE: I will allow it since he is here.

A It's a conjecture, as you can appreciate. In Denver the place should be filled within, perhaps, a four-month period of time, or less.

Q Do you know if any of the sub-leases

expire within the next six months?

A I believe there is one that will; I believe there is a twenty thousand square foot tenant whose lease will expire.

Q Mr. Flanagan, during the course of these proceedings how has Overmyer's ability to rent space been in relationship to what it was before the petition was filed?

MR. BLUM: Objection, Your Honor, that is a speculative question.

THE REFEREE: Overruled.

A It's been hampered severely.

Q But, would you venture any personal knowledge as to how much it's been hampered?

A Well, it's not been an item that had been critical up to this point because in the buildings retained by the receiver the need for sales in these buildings is virtually non-existent and the vacant space is below ten percent.

Q You testified that Albertson's lease expires shortly?

A Yes.

Q What would be the revenue per month without that lease?

A Ten thousand dollars.

MR. ZIMMERMAN: No further questions.

RE-DIRECT-EXAMINATION BY MR. SANDLER:

Q Mr. Flanagan, if that vacancy did occur, do you anticipate, based on your knowledge and experience, that you can re-let it within a reasonable period?

A Yes.

Q What would a reasonable period be?

A In Denver, I projected for the other gentleman, a period within four months.

MR. SANDLER: No further questions.

RE-CROSS-EXAMINATION BY MR. ZIMMERMAN:

Q Now, is your answer based upon your pre-bankruptcy experience?

A No, not necessarily - - it's hard to tell.

Q Have you rented any space in Denver since the petition has been filed?

A Not in Denver, to my knowledge.

Q So, you don't have any experience as to how long it will take you to rent space since Overmyer has been in Chapter XI?

A Run it by me one more time?

Q What kind of experience do you have in renting space subsequent to the initiation of this proceeding?

MR. SANDLER: We are going to object to that. He is answering on his own nine years' experience with the company.

THE REFEREE: Overruled. It can't hurt it.

A It varies from one market area to another. It's hard to give you one answer that covers.

Q Do you have any other Denver warehouses, Overmyer?

A I don't have the list in front of me as - - yes, we have two others. One is in Denver.

Q Do you know whether they are full or not?

A I don't have the records with me.

MR. ZIMMERMAN: No further questions.

MR. SANDLER: Thank you.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

In the Matter
of

D. H. OVERMYER COMPANY,

Debtor.

No. 73 B 1130

United States Court House
Foley Square, New York, N.Y.

January 24, 1974
8:00 o'clock a.m.

LANDLORD'S MOTION FOR POSSESSION
DENVER #4 - (HAHN, HESSEN, MARGOLIS & RYAN)

Before:

HON. ROY BABITT, Referee In Bankruptcy

BARRY W. RAYVID
Official Court Reporter
U.S. Courthouse (R. 230)
Foley Square, New York, N.Y. 10007

APPEARANCES:

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BY: GARY BLUM, ESQ., Of Counsel
-and-
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Attorneys for the Receiver
292 Madison Avenue
New York, New York

BY: WILL B. SANDLER, ESQ., Of Counsel

- - - - -

PROCEEDINGS

MR. BLUM: If Your Honor please, on behalf of the debtor proponent on the order to show cause, Your Honor has set the matter down for February 11th, 1974.

Our office has served letters on the respondents named in the order pursuant to

your direction. We have not completed our brief and I must admit I had no recollection that Mr. Zimmerman would be placed on today's calendar with respect to that motion, because I thought it was that everybody was going over to the 11th.

In any event, I believe that Your Honor had requested authority with respect to Your Honor's jurisdiction to compel what the debtor seeks, which is an accounting by non-bankruptcy-type proceedings, and receivers, trustees, agents and the like, to account to this Court.

We have checked Section 74 of the old Bankruptcy Act and we are convinced that Section 311 as exposed by Collier's on Bankruptcy provides this Court with complete jurisdiction to adopt Section 69D and Section 2A-21, and we will so provide the Court with a brief in support of our motion.

MR. ZIMMERMAN: Your Honor, there certainly appears to be a question as to whether all or part of Rule 65 of the Federal Rules of Civil Procedure applies in this

instance.

Whether it does or it doesn't - -

MR. BLUM: I think we are talking about two different motions.

THE REFEREE: He is talking about your motion.

MR. BLUM: Not the one I gave to Your Honor. Rule 65 is a temporary restraining order.

THE REFEREE: Yes.

MR. BLUM: Having to do with an adjournment.

THE REFEREE: Yes. He is talking about a TRO continuing.

MR. ZIMMERMAN: Whether it does apply or doesn't apply, I think it's clear that in an equitable sense a respondent on a motion for what amounts to be a preliminary or permanent injunction has the right to a hearing on whether such preliminary injunction or temporary restraining order pending a determination should issue, and the burden is upon the party asking for that relief to establish that the failure to grant the TRO would result

in harm, and I don't mean a general allegation of harm, I mean a specific allegation of harm.

He must show that he has a right and that the act sought to be restrained would violate that right. And, the words "irreparable injury" mean that no injunction will issue if there is an admitted remedy. I cite Bestwick & Company against United States, 134 Fed. Sub. 132. This is a case in this district.

THE REFEREE: They are not bankruptcy ases where the considerations are somewhat different.

MR. ZIMMERMAN: I agree with Your Honor. Your jurisdiction in this situation is, if any, over property of the debtor. I still say that the showing must be made by the debtor and/or receiver to the affect that my client, the respondent here, has done something to violate their rights or is doing something.

THE REFEREE: Doesn't he allege if your client and all similarly postured people were to withhold their rents or to direct the subs

to pay to them, they would be inhibiting the ability of the receiver to run this case?

MR. ZIMMERMAN: I don't know whether he stated that.

THE REFEREE: Paragraph 5.

MR. ZIMMERMAN: The net affect of the entire motion - - I don't see any allegation about my client.

THE REFEREE: He lumped them together. He is not sure whether your client is doing that or a third thing.

MR. ZIMMERMAN: This petition is so vague and ambiguous - -

THE REFEREE: The whole thing will be argued on February 11th. The stay will continue. It seems to me enough is shown.

MR. ZIMMERMAN: What is shown?

THE REFEREE: Enough is shown that there is an inhibition on the receiver to collect the rents required by the sub-tenants.

Has this sub-tenant paid the rent to Mr. Sandler?

MR. SANDLER: If he is named in the order, I have to assume there is self-help or

some other interference.

THE REFEREE: In other words, we haven't collected it?

MR. SANDLER: That is correct. The landlord is in court. That is why he was brought here.

MR. ZIMMERMAN: Are you going to make him your witness?

MR. SANDLER: Maybe I will.

MR. ZIMMERMAN: Then put him on the stand. They have to make some showing. They can't come up and say this respondent is doing something. They don't even say it about my client; they put a list of names there.

MR. BLUM: Under Section 314 of the Bankruptcy Act - -

THE REFEREE: I am always interested in how come Overmyer never verifies his petitions?

MR. BLUM: I know of no requirement to verify a petition except schedules of bankruptcy.

THE REFEREE: Anyone can state anything?

MR. BLUM: Except in schedules of bank-

ruptcy and statement of affairs, I believe the rules do not require verification.

THE REFEREE: All right, I have adjourned this for everybody else. I don't have the time to take these piece meal today.

MR. ZIMMERMAN: Why should my client be required to respond to an application - -

THE REFEREE: Because if your client should not be charged with this and if the sub-tenants have not been interfered with in paying to the receiver, then there is no reason to object to him being restrained from doing something he is not doing.

In other words, if this is a property on which the sub-tenants have not been paying because of things taking place in Denver, that which I don't know about, I think there is enough interference with the property of this Court and its jurisdiction to continue the stay. He has nothing to fear, does he, if he is not doing anything? - - They could have cited me and I would have thumbed my nose at them first of all for the simple reason I don't have the property or sub-tenants.

MR. ZIMMERMAN: There isn't an indication of jurisdiction - -

THE REFEREE: Maybe it's not the best grounded statement I ever read, but what do you expect. I will continue the TRO under Section 65, and if it's not Section 65, I may certainly continue it under my own broad power.

MR. BLUM: Under Section 314.

THE REFEREE: I take it your witness is on his way?

MR. SANDLER: He is on his way.

THE REFEREE: Let the record show we have been wasting forty-five minutes for a client of yours.

MR. SANDLER: Therefore, the receiver rests.

MR. ZIMMERMAN: Your Honor, the applicant moves to dismiss the defenses of the receiver and debtor on the basis they failed to make a prima facie case, and moves for a judgment on his case.

THE REFEREE: The motion is denied. Put in your case.

MR. BLUM: Will you accept a comment not on this particular case, but on all of these cases? - - It seems to me the debtor at this point but for the facts and circumstances which might be alleged by each landlord, the debtor is now of the opinion that the Court is well aware of the background in each of these cases. The same pattern exists.

I would recommend to my client that stipulations be entered into between the debtor, and recommend to the receiver and recommend to the Court that the debtor would be bound by the determination of this Court on all matters that have not been tried before Your Honor on the individual applications of landlords.

THE REFEREE: Only if you get the consent of the other side. I think that all of their own fact patterns would have to be put in.

MR. BLUM: And we would make certain concessions.

THE REFEREE: In the meantime, the only

counsel here is Mr. Zimmerman, representing one client. You can do anything you want between now and any future hearing to stipulate or make one pilot case on the law. That's your business.

I have no concern how you go about it.

L E O N A R D W O L F B E R G, having been duly sworn by Honorable Roy Babitt, was examined and testified as follows:

THE REFEREE: Please give your full name and home address to the reporter.

THE WITNESS: Leonard Wolfberg, 2669 Bellford Boulevard, Shaker Heights, Ohio.

DIRECT-EXAMINATION BY MR. ZIMMERMAN:

Q Mr. Wolfberg, are you the owner of the property out in Denver, known as Denver Number 4?

A Yes, I am.

Q Have you had any problems collecting rent from Overmyer?

A Yes, I have.

Q When did this trouble first begin?

A It first began in August of 1971.

Q Could you describe in your own words the course of your collection problems from the Overmyer operation up until the filing of the petition?

A At the end of 1971 the rent checks were coming in two to three weeks late. We notified Mr. Overmyer at that time, counsel in Cleveland, and we lived with that condition through 1972.

THE REFEREE: You finished Mr. Flanagan yesterday?

MR. ZIMMERMAN: Yes.

THE REFEREE: Through '72?

THE WITNESS: In February of 1973, it became critical to the point it was running with myself one to two months behind and with the mortgage company two to three months behind.

In April I called Mr. Overmyer because I hadn't received any money and discussed this matter with him, and during the course of the time - - I take that back - - I did go into New York a few weeks later and collected at the time, a twenty-five hundred dollar rent

check that was due, myself.

At the end of April when I still wasn't current and the mortgage company wasn't current I called him on the phone and told him it couldn't continue on in this manner, because there were defaults and if necessary I would, under the terms of the lease, assign the rents to me.

At that time he recommended that I didn't because if I did, he said this would be tied up legally in the court for a long time, indicating it would be a financial burden on me. On May 2nd, I received a letter from him.

THE REFEREE: What year?

THE WITNESS: 1973. I received a letter from him referring to this application and indicating the same thing, he would take legal action against me if I did anything like that.

Q Mr. Wolfberg, I show you a copy of a letter from the Overmyer Company, Inc., dated May 2nd, 1973, and ask you if that is a copy of the letter you are referring to?

A Yes.

MR. ZIMMERMAN: I would like to have this marked as Applicant's Exhibit "2" in evidence.

(At this time, a letter from the Overmyer Company, dated May 2, 1973, is received and marked Applicant's Exhibit "2" in evidence.)

Q Mr. Wolfberg, what transpired after you received this letter?

A After that time, there wasn't any further communication between ourselves until June 1st, nor did I act upon it in any manner, at which time I wrote him and told him that regardless of whether I considered this as a threat to me, something had to be done and asked him one more time if we couldn't become current.

On July 2nd, not having become current, the mortgage company wrote Mr. Overmyer - -

MR. BLUM: Objection, hearsay evidence.

THE REFEREE: Yes, I will sustain the objection as far as what he testified to as to somebody, what somebody not before the Court told him.

THE WITNESS: They wrote Mr. Overmyer.

THE REFEREE: You don't know that?

THE WITNESS: The sent me a copy of the letter.

Q Mr. Wolfberg, I show you a copy of a letter dated July 2nd, 1973, from Morrison & Morrison to Mr. D. H. Overmyer, and ask you whether you recognize this letter as a copy that was sent to your counsel?

A Yes, that's it.

MR. ZIMMERMAN: I would ask that this letter be marked into evidence.

MR. BLUM: Objection, Your Honor. The letter is hearsay and was not sent to this gentleman, it was sent to his counsel. We don't know if it was sent to Mr. Overmyer.

THE REFEREE: It's addressed to Mr. Overmyer on its face?

MR. ZIMMERMAN: Yes, Your Honor.

THE REFEREE: Your objection is overruled unless you have another one?

MR. BLUM: If Your Honor please, the letter is from Morrison & Morrison and it refers to Mutual Life Insurance Company of New York. It isn't even a letter from the

so-called mortgagee, it is a secondary-type. We don't know if this letter was ever sent.

The fact it's a photocopy of a purported letter does not indicate it's even evidence that we received it. There is no envelope attached. There is nothing.

MR. ZIMMERMAN: Your Honor, may I note that a subpoena duces tecum was served on the receiver and though you struk the subpoena duces tecum, I think there is a certain duty on the debtor and receiver to at least review its records regarding this case, and a review of their records would indicate that this letter was actually received by Overmyer.

I certainly think they had an adequate opportunity to receive it - -

THE REFEREE: Mr. Overmyer is certainly within the power of this Court and within the control of counsel to testify. I will accept this, not necessarily as to the truth in there, but as a letter sent to the debtor.

(At this time, a letter from Morrison & Morrison, dated July 2, 1973, is received and marked Applicant's Exhibit "3" in evidence.)

MR. ZIMMERMAN: This goes to the issue of the equity.

THE REFEREE: There is no issue as to the termination?

MR. SANDLER: This is - - Your Honor, there is no dispute as to purported termination.

THE REFEREE: Is there a bankruptcy clause asserted?

MR. SANDLER: Actually, we stipulated it.

MR. ZIMMERMAN: There is no bankruptcy clause. Judge, the termination notice was prior to the petition.

THE REFEREE: You rely on termination by reason of defaults under the necessary terms of the lease?

MR. ZIMMERMAN: That is correct. Also, under additional provisions under Section 7.01 of the lease which requires when there is a sub-lease that Overmyer was required, to deliver conformed copies of the sub-lease to the landlord, Mr. and Mrs. Wolfberg.

THE REFEREE: And he didn't?

MR. ZIMMERMAN: And he did not, and also, to deliver an undertaking from the sub-tenants that they would assume the lease obligations of the lease between Overmyer and the Wolfbergs.

Q Just to get the record straight, Mr. Wolfberg, did you or your wife ever receive conformed copies of the sub-leases or any undertaking by the sub-lessees to pay rent to you?

A No, never.

Q What transpired in the month of July?

A On July 19th I went to New York in a last effort to see Mr. Overmyer and collect rents that were due me for the months of June and July, and, also, I knew at that time that Morrison & Morrison who were the agents for Mutual Life Insurance Company, that the mortgage payments of forty-three hundred dollars went back a month or two prior to that and they had not been paid.

Mr. Overmyer said he didn't have any money and couldn't have, and there wasn't anything he could give me. He mentioned he hoped to get a loan.

I said, "I am willing to cooperate; if

you tell me when I will be paid, we will work out something because I can't go on not knowing what is going to happen because of my financial obligations."

He asked me to accept the note for June and July for my payments myself. He said if I accepted the note on August 1st, payment should come to me promptly and the 1st of the month thereafter. I agreed to it.

When he left I said, "What about the mortgage company?" I was quite concerned - -

MR. SANDLER: If Your Honor please, counsel served a very extensive request for admissions. He is now going down each and every admission and putting it into the record now.

What was the purpose of us to admit the non-payment of rent, the maturity of the note?

You are going through each and every fact that we admitted.

MR. ZIMMERMAN: The point was to put in the affirmative case.

MR. SANDLER: He is here - -

THE REFEREE: All you can ask me to do is

take judicial notice of your notice to admit, which I did, along with the lack of response - -

MR. BLUM: We responded.

THE REFEREE: Actually, one item was in dispute?

MR. BLUM: Two.

MR. SANDLER: Nineteen.

THE REFEREE: I don't see any reason unless you want me to watch his demeanor if he weeps which would be an appeal to the Court's equity.

I will take judicial notice of the notice to admit and the responses.

MR. ZIMMERMAN: That's perfectly fine. There are two points I want to make. First of all, I think it's completely out of line for the receiver's counsel to make any comments about the time extended by the Court - -

THE REFEREE: Are you aware we sat from eight in the morning until eight-fifteen straight yesterday? - - I cannot devote the rest of this Court's time to one case. The

alternative would be to ask the chief judge to give it to another of my colleagues and let the whole thing be tried de novo. If I can cut down the time these cases take, I am going to try. There is no reason for you to go through everything that is no longer in dispute.

The purpose of a trial is to adduce facts that are in contest.

MR. ZIMMERMAN: This testimony is not for the purpose of showing defaults.

THE REFEREE: What is it going to show, that Mr. Overmyer is no good? What is it going to show?

MR. ZIMMERMAN: Basically, it's going to show that the Overmyer companies are not entitled to the equitable relief of this Court.

THE REFEREE: How will you show it, by going through whatever has been deemed admitted?

MR. ZIMMERMAN: Your Honor, I want to show that Mr. Overmyer consistently lied to and misled my client.

MR. SANDLER: I object to counsel's remarks unless he wants to take the stand.

THE REFEREE: Overruled.

MR. ZIMMERMAN: And, behaved in such a manner that under the decisions of the Circuit Court he would be deemed not to have clean hands.

THE REFEREE: I am going to tell you something, and everybody in this case, if this were not a Chapter XI where I have dozens and dozens of creditors actually, I might be more moved to - - by Mr. Overmyer's behavior. I have observed him in this court, too.

But, I think you ought not overlook that the purpose of this Chapter XI is as much to rehabilitate the debtor as it is to benefit his creditors, and no matter how unclean his hands are, no matter how personally he may be a thoroughly irreprehensible character, the fact remains if this case stays alive or if I rule for the debtor, it's not because of Mr. Overmyer, it's in spite of Mr. Overmyer, and I think you add nothing to this case.

I hav e thirty-five proved instances

where he has been behind, where he hasn't paid. Yesterday we had testimony at eight o'clock of one million four hundred thousand dollars in defaults.

How much more do I need to know he tried to put off one to pay another, and paid neither? What else is there?

Will you concede that Mr. Overmyer in all of these cases made promises to pay and didn't?

MR. SANDLER: Yes. That is why it is before the Court, Your Honor.

THEREFEREE: I don't understand you. I know he may be a scoundral but that is not the issue.

MR. ZIMMERMAN: Your Honor, it's my responsibility to build the record.

THE REFEREE: I think you have built the record on all of the issues on termination. Let them put their case in on equity and then let's see what you can do with it. I know this man was imposed on.

MR. ZIMMERMAN: You denied my motion for their failure to put in a prima facie case

and - -

THE REFEREE: And the burden of going forward is yours.

MR. ZIMMERMAN: I am putting in my case.

THE REFEREE: I don't want to hear any more testimony as to the day-by-day conversations of your client and Overmyer. I think there is enough in this record.

MR. ZIMMERMAN: If Your Honor will make a finding in this case that the Overmyer Company does not have clean hands, we will dispense with further testimony.

THE REFEREE: I could write a beauty of an opinion on equitable jurisdiction and never mention it once. I agree there were very substantial defaults; I think almost from the beginning they were in default. That is all I can make as a finding, and they probably ahve promised everybody to pay them while they shelled somebody and promises were broken while they paid the third guy.

MR. ZIMMERMAN: I have a further point to make with this testimony.

THE REFEREE: Go ahead, provided it goes to that, and quickly. I have already penalized the debtor for having a witness under its control, come forty-five minutes late.

Q Did you receive a notice, Mr. Wolfberg, of a foreclosure proceeding involving Denver 4?

A Yes.

Q What was the basis of this foreclosure proceeding?

A The foreclosure proceeding, if I understand you correctly, was the fact that the Overmyer Company did not clear with the mortgage company and they were going to foreclose.

Q Did you speak to Mr. Overmyer regarding this foreclosure?

A Yes, at the time I accepted the note I asked him. He said he had taken care of it. Excuse me, that happened the day before. When I returned home, I had the notice in the mail.

MR. SANDLER: Can we fix a date for that notice, please?

Q I show you a newspaper clipping-type notice of public trustee's sale and ask you if this is

the first notice that you received from that - - of that sale?

A Yes, it is.

MR. ZIMMERMAN: I ask it be marked into evidence.

MR. SANDLER: I object to the introduction at this time. There has been no testimony that this notice pertains to this property.

THE REFEREE: I will allow it.

(At this time, the said document is received and marked Applicant's Exhibit "4" in evidence.)

Q Did you then receive a second notice?

A Yes, a second notice was received at the same time by counsel - - received a letter saying it had been cleared, once again on the same date.

Q I show you a notice and ask you if this is the second notice you received?

A Yes, it is. That was received on the 26th of July.

MR. ZIMMERMAN: I ask that this notice be marked into evidence.

MR. SANDLER: No objection.

(At this time, the notice was received and marked Applicant's Exhibit "5" in evidence.)

Q Did you then receive a letter on the same day from Mr. Overmyer; did your attorney receive a letter?

A Yes.

Q Is this a copy of the letter?

A Yes, it is.

MR. ZIMMERMAN: I ask that this letter be marked into evidence.

MR. BLUM: No objection.

(At this time, the said letter is received and marked Applicant's Exhibit "6" in evidence.)

Q Did the Overmyer company make any attempt to clear this default?

MR. SANDLER: Objection.

THE REFEREE: What is the ground for that?

MR. SANDLER: It's too vague and too general, "did they make any attempt."

THE REFEREE: Overruled.

A I was in contact with the mortgage company and they said they did not - -

MR. SANDLER: Objection as to what the mortgage company said to you.

THE REFEREE: We are asking you about

Overmyer vis a vis you; if you have any knowledge what Overmyer did vis a vis you to cure the default?

THE WITNESS: I have no knowledge.

Q Did you, yourself, have to cure the default?

A Yes, I did.

THE REFEREE: How, when?

THE WITNESS: Upon receipt of this, I hired counsel in Denver; I went to the attorneys for the mortgage company, their mutual attorneys at their offices and we went over what had to be cleared.

While I was there, they telephoned their office here to see if any clearing had been made here in New York since a public sale was to be had on the 14th.

They said nothing had been done contrary, and it was necessary for me to clear it or else lose it at public sale. I sent in a check for thirty-two thousand two hundred seventy-seven dollars and seventy-seven cents.

Q Mr. Wolfberg, what is the main reason you don't want to have the Overmyer Company as a tenant

any longer?

MR. SANDLER: Objection.

THE REFEREE: Yes, how do I know that? Why don't you elicit what he does want.

If all monies were to be tendered to you today, would you be content to continue the lease with Overmyer?

THE WITNESS: No, sir, Your Honor.

THE REFEREE: Not even if full tender was made and full payment was made and you were completely brought up to date?

THE WITNESS: Your Honor, I feel that I have been more than lenient in accepting a note and having given every opportunity to cooperate. I was led to believe that this matter of the public sale was cleared and it wasn't.

The aggravation and not being able to get the truth - - I could have lost the property in the public sale. Nobody could have outbid me but if I didn't check into it, anybody could have gotten the Property.

Q Mr. Wolfberg, have you visited these premises lately?

A Yes, I visited them when I was there at that time, August 1st.

Q Was that the last time you were there?

A Yes, on the premises.

Q Did you notice any glaring - -

MR. SANDLER: Objection to "glaring."

MR. BLUM: Objection.

THE REFEREE: Yes.

Q Did you notice any physical problems - -

MR. SANDLER: Objection to "problems." Ask the witness what he saw.

THE REFEREE: Tell us about the physical conditions, what you saw, if anything?

THE WITNESS: The general conditions were that the building needed painting but there were two things most serious as pointed out to me by the tenants, one was the condition of the drive-way, the truck docks, particularly, in front of the truck docks that were sinking.

One of the tenants said they were going to have to repair it and I said I didn't have anything to do with the pavement of it.

They said it would cost about nine hundred dollars, just to make some kind of patch on it.

By my own observation it needed about thirty percent repair. They said they had to do it in the past on their own and deducted it from the rent.

The most serious condition was in the building itself. Although they said the roof leaked - -

MR. BLUM: Objection, hearsay.

THE WITNESS: What I did see in both buildings was a crack in the floor along the length.

MR. SANDLER: Could we have an explanation of what the other building is?

THE WITNESS: There are two buildings.

MR. SANDLER: This is a double building?

THE WITNESS: No.

MR. SANDLER: This is one building?

THE WITNESS: One is eighty thousand square feet and the other is forty. The tenants in both buildings pointed this out to me but, particularly, King Super (phonetics) in the

larger building. They have an entire eighty thousand square foot building.

This crack runs along the long length about five to six feet in back of the rail dock doors and truck dock doors.

Either they or yourself, the Overmyer Company, had repaired it by injecting some kind of plastic into it. They said the ground was soft underneath and I observed a couple of inches apart, and since the company has gone into Chapter XI, I understand that they had to have thirty-five hundred dollars worth of repairs just to try to get it under some type of control.

But, this is a very serious problem and it appears in both buildings, particularly where the heavy trucks over - - they have a serious problem.

MR. SANDLER: I move to strike "serious problem." The witness can testify as to what he saw. He testified as to a crack. We will take it.

THE REFEREE: For a case which is based solely on the use of the Court's equity power

to keep you alive. I never heard so many technical objections in my life.

We are not dealing with an issue of law where I have to resolve facts, I am dealing with an appeal to my conscience. Don't you think if a witness characterizes something as a two-inch crack as serious, it shouldn't make much difference to you? You are right technically.

MR. ZIMMERMAN: Can I qualify my witness as an expert?

THE REFEREE: No.

MR. ZIMMERMAN: I have no further questions.

CROSS-EXAMINATION BY MR. SANDLER:

Q Mr. Wolfberg, is King Super the prime tenant in the premises?

A Yes, sir.

Q He occupies about eighty thousand square feet?

A They occupy the one building.

Q Did you ever write to them in an attempt to collect rent?

A Attempting to collect rent?

Q Yes.

A No.

Q Did you ever ask them to pay the rent to you rather than Overmyer?

A No.

Q Do you have any correspondence with them at all?

A I had correspondence, yes.

Q In relation to what?

A After we filed the eviction notice and I had met with them, they told me, and I was quite concerned about this, they told me Mr. John Brooks, the vice-president of real estate, that if you people stayed in the building they were going to get out, if I stayed on, they were going to stay on.

Q Did you negotiate with them to stay on?

A After the eviction notice was filed.

Q What eviction notice are you referring to?

A To Overmyer Company that was filed in October for the defaults.

MR. ZIMMERMAN: That is in evidence on the Court record.

MR. SANDLER: Are you talking about the

legal action - - the local action - - in Denver?

MR. ZIMMERMAN: Yes.

MR. SANDLER: That you commenced or that counsel commenced?

MR. ZIMMERMAN: Yes.

Q Did you ever make any claim to any of the sub-tenants that rent be paid to you?

MR. ZIMMERMAN: I object.

THE REFEREE: Overruled.

A I didn't make a claim, but just prior, in the last few weeks, the tenants evidently were putting the money, withholding it themselves - - they didn't know who to pay after the eviction notice.

About two weeks ago or just prior to all this, my counsel there did send a letter - -

Q In other words, your Denver counsel did communicate with the tenant?

A This is evidently - - that would be several weeks ago.

Q Prior to this proceeding, is that what you are saying?

MR. ZIMMERMAN: A point of clarification?

THE REFEREE: I didn't understand that

his counsel had communicated at all. The tenants did this at some point.

A I am going back three or four months.

THE REFEREE: What happened three or four months ago?

MR. ZIMMERMAN: A point of clarification - -

MR. SANDLER: Let us hear the witness.

THE REFEREE: What is it?

MR. ZIMMERMAN: When Mr. Sandler addressed the previous question to my client, I don't think he understood the question. He asked whether he had - -

THE REFEREE: Tell us what happened three or four months ago?

THE WITNESS: When I had cleared the public sale, we served the eviction notice. When that happened, the tenants, the three tenants, in the property discussed this material with my counsel. They didn't know what to do with the payments. So, they withheld it and didn't pay anyone.

THE REFEREE: Yes?

THE WITNESS: Then, as this dragged on,

and other problems occurred, about two weeks ago or three weeks ago, my counsel did discuss this and did affect a letter and, in fact, a letter of indemnity is signed with one of the companies, was in the process with the others and was held up because of the temporary restraining order. There has been no further communication since that time.

Q Would you explain what you mean by a letter of indemnity?

A I am not a lawyer.

Q Give us the substance of what you understood what your lawyer in Denver was trying to accomplish?

THE REFEREE: If he knows?

A As I understand, the letter of indemnity is that the monies that have been withheld by the tenants are to be paid to me and if any demands are made upon them, they will have to pay them to Overmyer, it would be my responsibility.

Q So that in response to an earlier question when I asked if you had negotiated the rent be paid to you and you answered "No," your attorney has had negotiations as recently as a few weeks ago?

A That's the first time, but the rent goes back three or four months.

Q Let's go back three of four months. You said there was a meeting or some communication between your Denver counsel and your tenants with regard to the payment of rent. Were you at that meeting?

A I was, yes.

Q What did your lawyer say to the sub-tenants at the time when the question of payment of rents came up?

A It was just being withheld; he suggested they be put into escrow and, evidently, they held it themselves, and that it wouldn't be put in any court escrow.

Q Did you say anything at that meeting?

A Yes, I at the time, talked too.

Q What did you say?

A What did I say at that time?

Q What did you do?

A I was in agreement with my counsel.

Q That they should put the money in a fund, or something like that?

A No, I didn't say anything like that.

Q When the question of the payment of the rent came up, what did you say?

A When the question of it came up?

Q Yes.

A I don't think I personally said anything. My counsel was making the decisions.

Q What decisions did your counsel make?

A Counsel said he couldn't tell them what to do, as I recall - - I am going back a period of time - - that they should probably have to use their own good judgment, and they withheld it themselves.

Q Neither you nor your attorney had made any statement at that meeting thatthe rent shouldn't be paid to Overmyer?

A I can't remember what my attorney said. I didn't say it.

Q Is it possible that your attorney may have said it?

A Is it possible?

Q Yes.

A It is possible. I don't know.

MR. SANDLER: I think we understand.

MR. ZIMMERMAN: What is the relevancy?

MR. SANDLER: It's going to equities.

THE REFEREE: These people have been raped, robbed and butchered. When they resort to help under state laws they suddenly become criminals because this Court functions for debtors?

I have heard enough of this. What did you want these people to do in addition to being raped and robbed, that they should have buried themselves? Is that equity. Let's go.

Q You heard the testimony of Mr. Flanagan yesterday that the receiver and previously the debtor earns a profit on this property?

MR. ZIMMERMAN: I object. He is going beyond the ambit of cross-examination.

MR. SANDLER: No, I am not.

THE REFEREE: The point of the matter is we took this out of turn because Mr. Flanagan had to get out of town. Let's see if he heard the testimony.

A I heard the testimony.

Q You know that the receiver considers this a profitable lease?

A Yes.

Q If all the arrears owed to you were cured and if this lease was then assigned to a responsible third party, who had no relation whatsoever to Overmyer, would you have any objection to accepting that third party as a tenant under the lease and dropping your claim that the lease is terminated?

A With a responsible third party?

Q Yes.

A If I considered them more responsible than I have the Overmyer Company, I would have to consider that. It depends.

Q Assume that it's a responsible third party, and assume they would take over the Overmyer position, which means you could continue to receive the same rent as you should be receiving under the lease and would not be receiving any more by being able to collect directly from - -

MR. ZIMMERMAN: I object to the relevance. What relevance does it have?

THE REFEREE: Overruled. I will see you in chambers and explain the relevancy. It's not because I am smarter but because I have had these people before me for twenty-six

hours straight. Overruled.

A If I felt that it was going to be and not get into a situation like I am in today, I would certainly have to consider it because this is the original agreement I have made.

Q When you say "consider it," you mean consider it under the original terms you made?

A Yes.

THE REFEREE: You would have no objection?

THE WITNESS: No.

MR. SANDLER: No further questions.

MR. BLUM: No cross-examination, but I would ask Your Honor to permit us to put on Mr. Murray Guy as a rebuttal witness on the question of repairs.

THE REFEREE: No, I don't think it's terribly important at this stage if one property needs a lot of repairs and Overmyer didn't do anything and one needs a little less.

Have you any further questions?

MR. ZIMMERMAN: I have not. My rebuttal case is closed.

MR. SANDLER: Your Honor, we ask you to take notice of the records of the receiver with regards to an insurance cost of one hundred fifty dollars per month.

MR. ZIMMERMAN: Your Honor, I will stipulate that for the record.

THE REFEREE: I never knew you people to stipulate to anything except burial of debtors.

MR. ZIMMERMAN: I will stipulate that the insurance costs for the receiver are one hundred fifty dollars a month.

MR. SANDLER: We further ask, as was done in the cases yesterday, that we be given the opportunity to have the receiver or his accountant testify.

THE REFEREE: I think Mr. Zimmerman knows we still don't have one or two numbers to get to the bottom line figure. Assuming Mr. Flanagan's testimony was this building throws off one thousand dollars a month gross. Mr. Guy would then testify that two cents a foot, roughly, was set aside for maintenance. Then we have to reduce thatfigure by , roughly,

the insurance of another one hundred fifty dollars.

We still don't know and hope soon to find out from the receiver or his accountant how much of the over-all operation of Overmyer is allocable to each property, which will reduce it further. There may even be a further reduction if some of the particular properties have their own on-site expenses.

All of this goes to the question of the profitability of the enterprise in the particular warehouse, which goes to the Court's judgment to allow the debtor to remain in where he can yield that kind of profit. Every attorney can cross-examine the receiver or his accountant.

MR. ZIMMERMAN: Can we have a direction that they produce underlying records?

THE REFEREE: I assume that the receiver is going to have to buttress it. That's their business. If they don't want to make their case properly, that's how it goes.

Thank you, sir.

MR. SANDLER: If Your Honor please, is

it understood we have the same ruling with regard to the tender of an appraisal and the rejection of the appraisal?

THE REFEREE: The appraisal as proffered yesterday insofar as it is sought to assign an over-all value to the leaseholds was not only deemed hearsay but, also, is conjectural in view of the average lease running in excess of twenty-five years; not only was it based on the hearsay underpinning information received by the appraiser from third parties not before the Court, but also, because of the appraiser not having studied any of the documents for leases in comparable buildings, but also, for a thirty-five year speculation.

That would be my ruling in any instance where you offered Mr. Hiller's appraisal.

Thank you, gentlemen.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

In the Matter
of

D. H. OVERMYER COMPANY, INC., - (MICHIGAN)

Debtor.

No. 73 B 1143

United States Court House
Foley Square, New York, N.Y.

January 30, 1974
11:00 o'clock a.m.

LANDLORDS MOTION FOR POSSESSION
(FIDUCIARY RESEARCH - REAVIS & McGRATH)

Detroit 8

Before:

HON. ROY BABITT, Referee In Bankruptcy

BARRY W. RAYVID
Official Court Reporter
U.S. Courthouse (R. 230)
Foley Square, New York, N.Y. 10007

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- - - - -

PROCEEDINGS

MR. SANDLER: Counsel have agreed to stipulate most if not all of the factual issues in the case. Accordingly, it is hereby stipulated as follows:

(1) Fiduciary Research and D. H. Overmyer Company, Inc. (Michigan) entered into a lease dated sometime in '68 to commence on March 7th, 1968 for a twenty-year term plus four renewal terms of fifteen years each.

The initial term has approximately fourteen years left and the balance of the initial term plus the renewal periods result in a life expectancy of this lease of seventy-four years.

(2) The monthly rent in the sum of seventy-two hundred twenty-three dollars is presently in arrears through November of 1973 for three months for a total of approximately twenty-one thousand six hundred dollars. Total arrears for taxes and the twenty-one thousand dollars in rent arrears aggregate approximately ninety-five thousand

dollars.

(3) On or about December 3rd, 1973 the landlord mailed a notice which states that it is terminating the lease in question with the debtor. Receipt of the notice is acknowledged, but the receiver does not stipulate with regard to the legal consequences of the notice, and we request that the notice be marked as Receiver's Exhibit "1".

THE REFEREE: Is that a termination on filing clause notice?

MR. SANDLER: Well, the reason I am marking it in evidence as an exhibit is - - it says "Notice is hereby given it is terminated." It doesn't give a reason or time period.

THE REFEREE: Is it dated?

MR. SANDLER: December 3rd, 1973. We request that the notice be marked as Receiver's Exhibit "1" in evidence and that the lease be marked as Applicant's Exhibit "A" in evidence.

(At this time the said documents were so marked in evidence.)

MR. SANDLER: (4) At the end of

December 1973 the receiver was earning a gross profit (before insurance, administration expenses, and maintenance) of approximately ninety-six thousand dollars per annum, and by reason of one or two vacancies which occurred this month that gross profit figure was reduced to approximately sixty-six thousand dollars.

THE REFEREE: That's in January '74?

MR. SANDLER: As of this month it went down.

THE REFEREE: January '74?

MR. SANDLER: Yes. The parties agree that the vacant space which caused the reduction in the yield can be re-rented in the forseeable future, or that it is re-rentable space.

THE REFEREE: And roughly at the same rental as before?

MR. SANDLER: Correct.

(5) The insurance maintained by the receiver is approximately one hundred fifty dollars per month and the routine cost of maintenance for this warehouse is approximately two cents per square foot per annum. However,

the receiver concedes that in connection with this property in addition to the general estimate of two cents per square foot per annum an additional seven thousand dollars would be required to repair items which are the receiver's responsibility under the lease.

MR. BIRDOFF: The debtor's responsibility.

THE REFEREE: Or the debtor's, anyway.

MR. SANDLER: And the receiver as successor. It is stipulated that additional repairs would be approximately ten thousand dollars.

MR. GUY: In my estimate it would be divided sixty-five hundred dollars in the area of paving and three thousand dollars plus for other work - - say, six thousand dollars for paving and three thousand dollars for roof work, and one thousand dollars for landscaping.

MR. SANDLER: (6) In addition to the costs enumerated above there is an additional expense factor of office overhead and adminis-

tration, and testimony will be offered on this expense factor at a future time upon notice to counsel for the landlord who will have an opportunity to examine.

THE REFEREE: I want to just interpolate here for all cases that I don't believe it should be so far in the future to render meaningless these litigations.

MR. SANDLER: It's being worked on right now.

(7) By reason of the three months' unpaid rent due to the landlord under the lease the landlord in turn has fallen behind in his mortgage payments to the holder of the mortgage on the land and building in question in this proceeding.

MR. BIRDOFF: The arrears would be - -

MR. SANDLER: The landlord introduces as Applicant's Exhibit "B" a copy of the mortgage.

(At this time a copy of the mortgage and a copy of the mortgage note were so marked respectfully as Applicant's Exhibit "B-1"and "B-2" in evidence.)

MR. SANDLER: (8) It is understood none of the arrears under this lease referred to above have been tendered by the receiver or debtor at this time. It is further stipulated and agreed by and between counsel for the receiver and for the debtor and for the landlord that if the receiver within a period of thirty days from the date hereof tenders to the landlord sixty thousand dollars of the approximately ninety-five thousand dollars presently in arrears under the lease that if the landlord would agree to enter into a lease with the receiver and/or debtor for the same balance of the term at the same rental, except that the balance of the arrears would be amortized over the remaining life of the initial term of the lease clarifying the preceding tender, the landlord's attorney has indicated while they are agreeable to amortizing the balance of the arrears they are not committing themselves at this time to allow such amortization to proceed over the fourteen year balance of the initial term but may desire a shorter period and this point would

have to be negotiated.

It would be further understood in the event any such new lease is entered into that such lease would contain a provision that the within proceeding and any additional disposition of this proceeding would not constitute a breach of that lease provided all of the payments called for under the lease were current and made when due.

MR. BIRDOFF: Provided further that the sixty thousand dollars which has been previously mentioned by counsel for the receiver relates to both an amount sufficient to cover tax arrears and payment of principle and interest under the mortgage, which are prepetition, and the figure may be increased or decreased depending precisely upon what the arrears has agreed upon between the receiver's attorney and the attorney for the landlord are.

MR. SANDLER: Subject to approval by the mortgagee.

MR. BIRDOFF: In the event of a mortgage foreclosure proceeding or any other pro-

ceeding instituted by anyone against the property within the thirty-day period the stipulation is withdrawn, we will have to withdraw the stipulation because we will have to take action.

THE REFEREE: Is that the landlord in person?

MR. BIRDOFF: This is one of the officers, yes. Your Honor. It is further stipulated and agreed that the landlord is presently in possession of certain property which may belong to the debtor consisting of fixtures, a fork-lift truck, pallets, material, handling equipment, fire extinguishers, et cetera - -

THE REFEREE: That's subject to - -

MR. HERZOG: The point is some of the equipment is not the receiver's, it goes to corporations outside the Chapter XI. But, the debtor's attorney has indicated that the debtor will cooperate with the receiver in arranging, perhaps, an amenable price for this and if we do it will be in reduction of this sixty thousand dollars. In effect,

it's a third-party corporation. But, it will reduce this overall need to pay this sixty thousand dollars.

THE REFEREE: In other words, we are taking somebody else's property in reduction of our debt?

MR. BLUM: It will be done by consent.

THE REFEREE: It should be by resolution of that company.

MR. HERZOG: It will be. It's one of the Overmyer companies.

THE REFEREE: In any event, we are dealing with a company not before the Court.

MR. HERZOG: Counsel for the company is before the Court.

THE REFEREE: As long as he is satisfied I am willing.

MR. HERZOG: The material is unique. That corporation would have no use for it.

MR. BIRDOFF: It's understood, too, that Fiduciary Research will have a first right to purchase the equipment owned by Overmyer. It's on the premises, one of the premises which was leased from Fiduciary

which was settled.

MR. SANDLER: By the foregoing it shall not be implied that the landlord can't continue to use the Overmyer equipment and machinery without some compensation.

MR. BIRDOFF: That's right.

MR. SANDLER: I have nothing further.

THE REFEREE: All right, and I will get a memo of law?

MR. BIRDOFF: Yes, Your Honor, When would you like it by?

THE REFEREE: It doesn't matter. Next month?

MR. BIRDOFF: We will let you know in the alternative if mortgage forclosure proceedings are instituted.

THE REFEREE: Thank you, gentlemen.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

In the Matter
of

D. H. OVERMYER COMPANY,

Debtor.

No. 73 B 1144

United States Court House
Foley Square, New York, N.Y.

January 23, 1974
11:00 o'clock a.m.

LANDLORD'S MOTION FOR POSSESSION (EDISON NUMBER 24 - HENRY & BRECKER)

Before:

HON. ROY BABITT, Referee In Bankruptcy

BARRY W. RAYVID
Official Court Reporter
U.S. Courthouse (R. 230)
Foley Square, New York, N.Y. 10007

A P P E A R A N C E S :

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-and-
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-and-
WILL B. SANDLER, ESQ., Of Counsel
-and-
MICHAEL KLEINERMAN, ESQ., Of Counsel

MR. DANIEL H. OVERMYER
President of the Debtor

- - - - -

PROCEEDINGS

THE REFEREE: Now, Mr. Brecker, we are here on the Lazar matter.

MR. BRECKER: Your Honor, I have one very precise preliminary statement. Unlike, at least, the other case that I tried, and the cases that have been tried which I have observed, in this case I shall prove and I suspect the receiver would admit on the date of the filing of the petition for an arrangement the premises had been sublet prior thereto from Overmyer to American Hospital, an under-tenant, who was then occupying and still occupies the entire premises and is conducting a manufacturing business.

I respectfully submit to the Court inasmuch as there was no possession on the part of either the debtor or debtor in possession, or trustee, this Court has no jurisdiction at all over the property unless it finds that there was a lease in effect and owned by the receiver or debtor in possession.

Consequently, if Your Honor should find

that the pre-Chapter XI alleged defaults did, in fact, terminate the lease there would be no lease in the possession of the debtor or receiver which would divest Your Honor of jurisdiction.

Secondly, I would point out that under the Lane Foods case it is absolutely clear, and I quote from this in my brief, that Judge Weinfeld says that the basis for the stay is possession and since the debtor nor receiver were in possession at this critical date I believe my motion should be granted if I prove this allegation.

THE REFEREE: Isn't it implicit in Judge Weinfeld's ruling that the lease had terminated? Doesn't he speak about the debtor being given an opportunity to renegotiate a lease?

MR. BRECKER: Absolutely, yes.

THE REFEREE: It would seem to me, and I haven't read the case in some time, implicit in his decision is recognizance of a terminated lease either because of breach of the rent clause or bankruptcy

clause and, nonetheless, as I read his decision he retains an equitable power and, obviously, the right to assert jurisdiction.

If you are right neither Judge Weinfeld nor the referee had any power to at all become involved with equitable considerations.

MR. BRECKER: What Judge Weinfeld clearly said inasmuch as the debtor was in possession of the premises on filing even if the lease was terminated prior by non-payment it had nothing to do with the bankruptcy clause. He said, "I have the equitable power to stay not until the conclusion of the arrangement as urged by the debtor but at least to let the debtor renegotiate or find new premises."

THE REFEREE: The difference that we are all going to have to grapple with is there Judge Weinfeld was dealing with the type of business where the debtor was in physical command of the premises, that is to say, a luncheonette operation. Here we have a manufacturer that is in the physical parameters.

Here we are dealing with a debtor who has never in that context been physically in possession of the four walls of the building. All he has is a piece of paper which, I suppose, gives him a right of re-entry or whatever landlords have.

I think to that extent Lane Foods and this case part company.

MR. BRECKER: Excuse me for a moment. When you are dealing with premises where the debtor had operated a public warehouse I would totally agree with what Your Honor says. But, in a situation - - and this is an exception situation - - where the premises were not operated as a public warehouse but were sublet to a third party to conduct a manufacturing operation this becomes similar to other very common situations that come before the Court.

This is not a case where the debtor leased storage space, if you will, this is an unusual situation or an exception and I guess that's all I can shed on it.

MR. BLUM: I would just ask Your Honor

to take into account the following:

The legal distinction, of course, between the subletting and the rights of the Overmyer operation as a sub-landlord as distinguished from an outright assignment. I think the testimony in this particular case as well as any other case will disclose the following:

In no situation did the Overmyer operation lease its premises for the full length of time of the major lease between the major landlord and Overmyer, and in most instances, as we have heard testimony in these cases, the sub-lease entered into by Overmyer was either a short one, from month to month, to two years, three years, five years.

THE REFEREE: And, you are sitting under a thirty-five year lease.

MR. BLUM: Exactly.

THE REFEREE: I don't know if I have to go that far. I just have the feeling there is a vastly different debtor than the kind of debtor that Judge Weinfeld had.

I think a debtor who is in business is physically able to possess the four walls.

MR. BLUM: Yes.

THE REFEREE: A debtor whose sole business is renting space as a landlord is a vastly different, to me, kind of debtor. But, I still think it is implicit in Judge Weinfeld's decision, and if I am right in my distinction between possession, that the lease between the restaurant man in Lane Foods had terminated or else it would not have been necessary for Judge Weinfeld to go out of his way to give the debtor time to renegotiate a new one. That is how I size it up off the top of my head.

MR. BRECKER: It even goes further because the lease had been terminated by some process of the State Court. I can't characterize the nature of the document.

THE REFEREE: I, quite frankly, will tell you now, Mr. Brecker, with the utmost respect for Judge Weinfeld he was dealing, in my judgment, with a vastly different debtor.

This case, therefore, is not going to turn on the same considerations that impelled Judge Weinfeld to use the language he did use. You can possess property which you use for a dress shop but you can't possess what you sublet to everybody on earth.

MR. SANDLER: Let the record show I have been very quiet up to now.

MR. BRECKER: You won.

THE REFEREE: He didn't win. On that issue your motion is denied insofar as I rely on the precise language which Judge Weinfeld has always used.

I am sure Judge Weinfeld would not be aghast or consider me acting in derrogation if I drew what I consider at this juncture to be a very valid distinction in the nature of the operations of Park Lane Foods, debtor, Overmyer.

MR. SANDLER: Just on that point, briefly, in the type of operation involved in Lane Foods or even in the Judd case, the operator or tenant could easily lease other space, he could find other space.

THE REFEREE: No doubt.

MR. SANDLER: In this case our rights to the leaseholds are our stock and trade. We are being liquidated if we lose the leaseholds.

THE REFEREE: The man who is obliged to move from Brooklyn to the Bronx has lost his good will. Anyone can sell a sandwich if you have a customer.

MR. SANDLER: But, he has a shot if he stays in the neighborhood and rebuilds it.

MR. BRECKER: Could the record indicate, with Your Honor's permission, that the motion which has been denied was my oral motion made for judgment on the pleadings based upon possession not being in the receiver, and no other motion?

THE REFEREE: And, therefore, beyond the capacity of this Court to act equitably on something it hasn't got - -

MR. BRECKER: Only that - -

THE REFEREE: That motion orally made is similarly orally denied. I hope you have

stipulated as much as possible as we have been doing this morning?

MR. SANDLER: After Mr. Brecker's first witness and only witness we will attempt to stipulate on the appraiser and some of the other items that took place last time.

M O R R I S S T E R N, having been duly sworn by Honorable Roy Babitt, was examined and testified as follows:

THE REFEREE: Please give your full name and home address to the reporter.

THE WITNESS: Morris Stern, 41 Heily Place, Maplewood, New Jersey.

DIRECT-EXAMINATION BY MR. BRECKER:

Q Mr. Stern, what is your connection, if any, with the petitioners within the proceeding, to wit, Florence Lazar, Myron Rudkin (phonetics), et al?

A I am an attorney and was the attorney who closed the sale lease-back transaction in May of 1969. I have managed the property on behalf of the landlords since that time continuously.

I have filed the partnership tax returns for these people; I have dealt with Overmyer in the collection of the rents. My office has received the rents and disbursed monies to the landlords.

I have generally managed the property in that sense.

Q Mr. Stern, you have made reference to the closing of a lease. I hand you two documents, one entitled "this lease entered into this 14th day of May, 1969." and this lease modification entered into the 17th day of November, 1971.

Will you examine these documents and tell me whether they constitute true copies of the lease agreement which was entered into between the parties and a subsequent modification thereto?

A They appear to be without going through it page by page.

MR. SANDLER: Mr. Brecker, I think you should not separate that from the sale agreement. It was part and parcel of the same transaction.

If you want to mark all of them we won't have any objection, but they are inte-

grated.

MR. BRECKER: If Your Honor pleases, I see no reason why that document with the sale agreement is relevant and should be admitted in evidence. Nevertheless, if it's to be offered as the landlord's case I will comment then. I am not going to introduce it in evidence.

THE REFEREE: Then don't. You are going to have a right to cross-examine.

MR. BLUM: The testimony is the sale lease-back. Therefore, it is part and parcel of a contract of a sale if, simultaneously, a lease is entered into. It is not the best evidence to take just the lease.

THE REFEREE: Aren't most of these sales and lease-backs?

MR. BLUM: Not all.

THE REFEREE: Most of them we have had. What is the big difference?

MR. SANDLER: Mr. Brecker sharpens our witnesses. This really is a point and we should have been introducing the contract of sale in all of them. It's one transaction

called sale lease-back.

THE REFEREE: Why?

MR. BLUM: It's an underlying investment which the lease is predicated upon. The return of the lease is predicated upon the investment; the investment is predicated upon the value of the mortgage. It's a package and that is the subject of the case we have on Windfall.

THE REFEREE: You have not been in every case raising the question.

MR. BLUM: I have done it.

THE REFEREE: You have? You did it with Pokrass on how much they had invested. I don't remember if you did it with the Sieglers.

MR. BRECKER: Can I tell you why this would be a Pandora's box if the Court didn't?

THE REFEREE: Yes.

MR. BRECKER: I was prepared and hoping I would not have to adduce evidence respecting the incentive and the inducement to the petition or landlord.

THE REFEREE: I have your point. I am going to rule it out. I think probably it's carrying much further afield than what is to me a simple landlord's motion.

I will allow you to show the question of Windfall, but for me to get involved in possible fraudulent inducement there may be issues that I don't want to get involved with.

MR. SANDLER: Can I be heard? This is the first time I am making this argument so it's not redundant.

We would have gotten into it with oral testimony because we are getting two exhibits. In every one of these cases the landlords bought and sold at the same time. It was a pledge with the existing mortgage, existing tenants. He negotiated to put away a certain sum of money for a certain period of years and, in effect, to be paid back over a certain period of years. This amounted to a loan or mortgage transaction.

The landlord in this case is a technical landlord; he is holding and bears legal

title to nothing else; the landlord is not a lender, he is there for tax reasons.

This very transaction has been referred to in cases and in arm-length transactions as an "equitable mortgage." A sale-lease-back has been referred to as an equitable mortgage.

The Internal Revenue has frequently taken the position this is not a true sale -- the person owns nothing, he has a return, he has no right to do anything with the property. The person who has the property is the one who built it, operated it. They say since you really loaned money we are going to deny you the right to take the tax shelter. This is a point building up in the Internal Revenue.

THE REFEREE: Then, I will tell you my ruling.

MR. SANDLER: I haven't connected the point as to why I am raising it. If we have an equitable mortgage situation here, which means that the landlord who is a lender stands as a mortgagee, and there was a

foreclosure, the landlord would get back the balance of his loan. If there is an equity over and above the balance of the loan it reverts back to the borrowers or true fee owner, in this case the landlord, once everything is completed.

THE REFEREE: Mr. Brecker, do you want to add anything?

MR. BRECKER: I am constrained to make three points. If we look behind the lease agreement and then look to incentive and talk to terms of equitable mortgage, or loans, we must look at the alleged and represented financial condition of Overmyer when the transaction took place.

When I start adducing evidence of what they were allegedly then and what they are now Your Honor must find, if Your Honor please, that my security for going into this deal, not the land, but the Overmyer net worth, has been so permanently and inalterably damaged that to sustain these leases would be to unconscienably deny the landlords what they originally allegedly bargained for,

that is, the income, and look for a financially secure tenant.

Point number two, I respectfully suggest and absolutely state that my learned adversary is incorrect concerning the tax ruling. Moreover, we know a cow must always be a cow in the law of contract and tort, but when you go into the Internal Revenue Service we find new rules and I don't think the argument is relevant and ask that it be excluded.

THE REFEREE: Number one, what is meat for the tax is not necessarily meat for this Court. The considerations of the tax gatherer are vastly different than the considerations which motivate this Court in these proceedings.

Therefore, insofar as reliance is made on what the Internal Revenue Service have characterized this as I think that the objection to that evidence is sustained.

I don't believe at this juncture, at this time, the Court is going to construe anything more than what the parties themselves decided upon, a lease between the parties for

a long term. The length of the term, the possible windfall, will all go to the merits of the Court's exercise of its forebearing power as a Court of Equity.

I do not at this point propose to go that far afield to inquire into the motivation on either side nor the underlying sale and lease-back of this property.

The only document that has bearing on these controversies is the lease, the length of the lease. The money the landlord may have invested all goes to the Court's power.

I don't believe it would be prudent for me to go into the underlying rationale at this time of the underlying arrangement. As far as an equitable mortgage my understanding is that the law frowned on such concepts of creating an equitable mortgage. To me this is a simple matter of a landlord who leased property.

The objection is in all respects sustained. You may introduce the lease; you may preserve your exception.

MR. BRECKER: Let the record indicate I have handed the proposed exhibit to counsel.

Q Mr. Stern, you have again furnished me with the documents which you said were copies. Have you reviewed your records and refreshed your recollection as to the certainty of them being true and accurate copies of the originals?

A Yes, they are true and accurate copies of the originals.

THE REFEREE: What is taking so long?

MR. BLUM: It's an unsigned document. We can't tell whether these have been executed or not.

THE REFEREE: What is that, the lease?

MR. BLUM: It's a modification.

THE REFEREE: Didn't Mr. Brecker annex that to his motion?

MR. BRECKER: Yes, Your Honor. Can we admit the lease itself in evidence and let me examine further respecting the lease modification?

A I have an executed copy of the modification.

MR. BLUM: On that representation we don't object.

THE REFEREE: Mark these documents as Applicant's Exhibits "1" and "1a" in evidence.

(At this time the said documents were so marked in evidence, Applicant's Exhibit Number "1" being the lease and Applicant's Exhibit "1a" being the lease modification.)

Q Mr. Stern, I show you Applicant's Exhibit "1", which was the lease agreement, and ask you if you know who prepared that agreement?

A Yes, I do.

Q Will you tell me who prepared it, please?

A The source of the document - - I don't know the individual. The source of the document was the Overmyer Company.

Q Now, I show you Applicant's Exhibit "1a" and ask you if you know who prepared this document?

A Yes, I prepared this document.

Q Can you relate to me the circumstances which surrounded or impelled the preparation and execution of Exhibit "1a"?

A Yes, in late - -

MR. SANDLER: Excuse me, I object because the agreement recites the history of the facts leading to the execution of the agreement.

THE REFEREE: I think it's relevant. It's certainly not barred by any rule of evidence that I know of as to how or the underlying reasons for the entry into the document. It speaks for itself; I will allow it.

I don't know why we are going so far afield.

MR. BRECKER: I don't want to characterize the evidence.

A In the summer of 1971, August or so, I was contacted by the bank who held the mortgage, the Broadway Savings Bank, now Prudential. It was indicated to me there were defaults in the payment of the mortgage, which was a lease obligation of the Overmyer Company and that the bank was

going to foreclose.

I then contacted people at Overmyer, I think Sillcocks & Altof (phonetics), if I remember correctly, and of course complained to them that they mortgage was going to be called and foreclosed. Thereafter there were negotiations.

There was a negotiation between and among the bank, Overmyer, and myself to modify both the basic mortgage, which was on the property when we purchased it and the lease. This document, what you call Exhibit "1a" is the result of that negotiation.

The mortgage was changed so that quarterly payments became monthly payments, and there was an additional condition put in by the bank. I felt it necessary to change the lease and we modified it.

Q Did an instance occur prior to the summer of 1971 where the tenants, Overmyer, failed to pay its lease rental or failed to perform other undertakings required of it by the lease agreement.

MR. BLUM: Objection, counsel is leading the witness.

THE REFEREE: Absolutely, Mr.

Brecker, the most obvious instance of putting the words in his mouth.

MR. BRECKER: I most spectfully - -

THE REFEREE: Argue with the ruling?

MR. SANDLER: Aside from leading the witness - -

THE REFEREE: I have sustained the objection to that question. How many times do I have to shoot it?

Q Mr. Stern, would you detail or set forth for the Court, a history of the transactions between the tenant, Overmyer, and the landlord under the lease agreement, Exhibit "1", commencing from the date of the execution of the lease agreement through the summer of 1971?

A Frankly, my recollection from the closing date, May of '69, until '71 is not great. I recall writing to Overmyer asking them that they sharpen up their rental payments because they had been falling further and further behind in the rental payments.

It sort of culminated in the bank's call of the mortgage which, again, resulted in this lease modification.

Q Mr. Stern, was an action ever filed with any court respecting the circumstances involving the mortgage which you have testified was one of the or the underlying basis for the modification of the lease, Exhibit "1A"?

A There was a foreclosure actually filed and served on the landlord and, I believe, on Overmyer, but much later. In June of '73, we served the summons and complaint.

MR. BLUM: I don't see the relevancy of a foreclosure on a mortgage to the issue.

THE REFEREE: He already answered it, overruled.

Q Were there any other actions filed with any court subsequent to the summer of 1971 and excluding the within arrangement proceeding involving this particular subject property?

A Yes, there were two. The first was a summary dispossess action which I filed in May of 1973 after finding out that Overmyer had failed to pay taxes for the entire year of '71, real estate taxes '71-'72, and part of '73.

THE REFEREE: Did the lease require those payments?

THE WITNESS: Yes, Your Honor, as additional rent.

THE REFEREE: How come it took you two years?

THE WITNESS: I was relying on the bank's searcher, and the bank's searcher had issued to them an erroneous statement that the taxes were paid. A tax lien was sold on the property for the '71 taxes in December of 1972. All this I incorporated - -

THE REFEREE: Who bought it, your people?

THE WITNESS: The town bought it.

THE REFEREE: How does that work?

THE WITNESS: The town can pick it up and it's redeemable.

THE REFEREE: By anybody?

THE WITNESS: Most particularly by the landlord.

THE REFEREE: Did they redeem it?

THE WITNESS: After the summary dispossess action was settled, by Overmyer in May of 1973, the court gave us a check to pay the taxes. At that time, there were also

arrearages on the mortgage and on the basic rent, the net rental.

We received sixty-five some odd thousand dollars either immediately then or within a few days, the lump sum being to redeem this lien from the township, the Township of Edison that was the first litigation, as I say, which was sold by a consent order.

MR. BLUM: I move to strike the testimony "settlement of the litigation" because this is all beyond the scope of this action.

THE REFEREE: That's correct. The jury will disregard th i s statement. Otherwise, your objection is overruled.

THE WITNESS: The second litigation was instituted by me in late October, 1973. That was an ejection action. As distinct from the first action which was summary dispossess, it was brought by me to remove the cloud that I felt was on this property. At that time I was negotiating with the subtenant, American Hospital Supplies, and they asked me to get some court ruling that Overmyer's interests were terminated as a result

of action I had taken through August and September, 1973.

I then filed a complaint to remove that cloud in the ejectment proceeding.

Q At the time that action was instituted to what extent was Overmyer in arrears in rent or additional rental or payments required under the lease at the time?

MR. SANDLER: I think what is relevant is what are the arrears now. Anything that has been paid previously and if the arrears were wiped out is not an issue.

What are the arrears now?

MR. BRECKER: Excuse me, Your Honor, the debtor and the receiver employ this Cout to exercise equitable power, which it does not have, to sustain a lease. I suggest to the Court that in determining whether equity should be dispensed the record must contain a history of the relationship between the parties so the Court if it should find power, must determine whether this power should be exercised.

I quote from an opinion; I believe it's

a Second Circuit case that I referred to in the brief I have filed which states:

"When a party seeks relief from forfeiture, seeks equitable relief, he must come to the Court with clean hands."

I think we have to look at how this debtor has conducted itself to determine whether they are entitled to whatever equitable powers this Court may have. That is why all of this is relevant.

THE REFEREE: I will allow it. What are the grounds of termination here?

MR. BRECKER: They are two-fold here. A complaint which I am shortly going to introduce into evidence concerns the defaults I am now going to ask about.

THE REFEREE: Supposing the defaults were cured before the Chapter XI?

MR. BRECKER: If all of the defaults were cured, there would be a termination by virtue of the filing of the Chapter XI.

THE REFEREE: But, only on the basis of non-payment. Isn't it relevant we know how much was paid?

MR. SANDLER: I agree.

THE REFEREE: Why are you interested only in the arrearages today?

MR. SANDLER: If he were to ask what the arrearages were in 1971, the second question would be were they paid.

MR. BRECKER: I am going to, if you will permit me.

Q Mr. Stern, at the date of the filing of this action which you have referred to as the most recent action, what was the indebtedness, if any, of Overmyer to the landlord of actual unpaid rentals and other required sums under the lease?

A It's attached as a schedule.

Q Well, I show you a document entitled "Complaint" which was incorporated as Exhibit "B" of the application. I ask you to look at that document.

Does it refresh your recollection respecting the amount due?

A Yes, this is the complaint I filed for ejectment. It was Schedule B for unpaid rent for August, September and October, each month being two thousand eighty-three dollars and thirty cents. Unpaid additional rent is made up of mortgage pay-

ments and real estate taxes, and that is five thousand eight hundred eighty-three dollars and twenty-eight cents per month.

Q Have you read this complaint, Mr. Stern?

A I read it and wrote it.

Q Is it accurate and truthful in all respects?

A I believe it is.

MR. BRECKER: I offer in evidence the complaint which the witness has been referring to and which was marked as Exhibit "B" to the landlord's application.

MR. BLUM: I object to it. I see nothing here but an attorney's product, a claim. It certainly isn't probative of the facts.

THE REFEREE: Don't you think I know that?

MR. BLUM: Judge, we are cluttering up a record here.

THE REFEREE: Your objection is overruled. I didn't know you were so concerned with a record being cluttered.

MR. BLUM: I certainly am.

THE REFEREE: If you are, your objection is overruled.

MR. SANDLER: Your Honor, this is already an exhibit to the pleadings, it's already before the Court.

MR. BRECKER: It's not admitted.

THE REFEREE: I have not been asked to take judicial notice and receive a paper filed with me. Mark that in evidence.

(At this time, the said document was so marked as Applicant's Exhibit "2" in evidence.)

Q Mr. Stern, have any payments been made on account of the indebtedness alleged in the complaint marked in evidence as Exhibit "2"?

A I believe that there was one mortgage payment made subsequent to the filing of the complaint there. I am not sure but I believe - - yes, I believe there was one mortgage payment.

Q What was the amount of this payment?

A I think it was a mortgage payment for forty-two hundred twenty-seven dollars and nineteen cents.

Q Was this payment before or subsequent

to the arrangement proceeding?

A I believe it was made before, made in the gap period between the filing of the complaint in the New Jersey court and the filing of the petition.

Q How much money has been paid to the landlord on account of rent or, specifically, use and occupation? I refer to use and occupation and not rent during the hiatus bankruptcy proceeding.

A There was a payment made in late December of sixty-three hundred some odd dollars, and it seems to have been a figure of all rent ex real estate payments for that month.

Q Does that figure include the mortgage payment?

A Yes.

Q That was for what month?

A It was paid in December and I presume it was paid for the month of December.

Q Has any use and occupation been received by you or the landlords for the month of November?

A No, sir.

Q Or for the month of January, 1974?

A No, sir.

Q Now, Mr. Stern, upon the filing of the arrangement proceedings by Overmyer, did you take any action with respect to the lease?

A Yes, I did.

Q What action did you take?

A At that time I re-examined the lease. I had previously sent the series of termination letters through August and September under the non-payment provision.

At that time I re-examined the lease because I felt the lease provided for additional grounds of default. I sent a letter to Overmyer, as I had done in the past, saying I had terminated their lease before but this is an extra, added ground, "You again defaulted by filing a Chapter XI Proceeding."

I sent two letters as was my practice. They were both returned. I then took those letters, put a cover letter on them, and sent them over to Mr. Herzog. That was late November and early December, 1973.

Q I show you a copy of a letter dated November 29th, 1973, which was marked as Exhibit "C"

to the landlord's application, and ask you if that is a copy of the letter you referred to which was sent pursuant to the filing of the Chapter XI?

A This was the first letter sent to Overmyer which was rejected.

MR. BRECKER: I offer in evidence a copy of a letter dated November 29, 1973.

MR. SANDLER: No objection.

(At this time, the said document was so marked as Applicant's Exhibit "3" in evidence.)

Q I show you a copy of another letter dated December 3rd, 1973, respecting D. H. Overmyer Company, Inc., and ask you if this is the subsequent letter which you have referred to?

A Yes, this is the letter that I sent to Robert Herzog which had attached to it the letter that Overmyer rejected on November 29th.

MR. BRECKER: I offer in evidence the letter of December 3rd, 1973.

MR. SANDLER: No objection.

(At this time, the said document was so marked as Applicant's Exhibit "4" in evidence.)

Q Mr. Stern, you had made reference

previously in your testimony on other notices respecting non-payment. Are copies of these notices annexed to the complaint which is marked in evidence as Exhibit "2"?

A Yes, they are, the letters of August 21st, September 10th - - there were two of September 10th because I was also noticing the sub-tenant - - and two of October 22nd which related to the ejectment, and notices required by New Jersey law to file an ejectment complaint.

MR. BRECKER: That's my case.

CROSS-EXAMINATION BY MR. SANDLER:

Q Mr. Stern, were you involved in the negotiations to acquire this property?

A Not formally involved in the negotiations as such, no, sir.

Q Were you familiar with the negotiations directly or indirectly?

A I had some familiarity indirectly, yes, sir.

Q Do you know how the rent was fixed in the lease?

A I am not certain but as I recall, the discussion sort of, on this side of this table, on

the landlord's side of the table, I believe it was just a function of a net-net-net throw on the invested capital.

Q A cash throwback on the invested capital?

A Yes, sir.

Q That's after paying taxes and mortgages?

A Real estate taxes and mortgages. It was a simple net-net-net lease.

Q Are you aware of how long the balance of the lease had to go, the balance of the original terms, including the renewal option?

A I believe it was a twenty-year lease with two ten-year options. It was executed in 1969.

Q It's fifteen plus twenty?

A Yes, that is correct.

Q Thirty-five years?

A Yes.

Q During that entire period, it's a single rent, is it not?

A No, it's not.

Q Does the rent reduce?

A Yes, it does.

Q When does it reduc ?

A In the event that Overmyer exercises its options in five years for tenancy and renewal of the lease, assuming that it's ten years from that, the rental then becomes, I - - I think it reduces by twenty-five percent.

Q Forgetting even the reduction, you in your capacity as representative of the landlord, then, have a cash throw that is a constant cash throw that can't be increased in any manner, and presumably, should not be decreased, it's a constant return?

A Yes, sir.

Q Do you know how much cash was invested in this transaction?

A Yes, I believe it was two hundred seventy-eight thousand dollars in cash.

Q What percentage was the landlord to receive on the two hundred seventy-eight thousand dollars?

A I think it was something like nine percent. The simple net throw was twenty-five thousand dollars on two hundred seventy-eight thousand dollars invested.

Q Mr. Stern, you are aware, are you not, that the rent that that one sub-tenant at the premises pays to Overmyer exceeds the rent that Overmyer pays to you?

A Yes, I am aware of that.

Q Are you aware by how much it exceeds it?

A I am not aware of it.

Q How much is that figure?

A It's my understanding - - I have gotten the sub-lease - - from reading the sub-lease I believe that the rental paid by the tenant, American, is a multiple of - - it's something like eighty-three thousand dollars or eighty-four thousand dollars as compared to the twenty-five thousand dollars.

Q Would it refresh your recollection if I told you that the sub-tenant pays to Overmyer, approximately seven thousand dollars a month more than Overmyer pays to you?

A That's the figure, eighty-four thousand dollars.

Q And eighty-four thousand dollars - - the differential?

A That's the figure, eighty-four thousand dollars.

Q And eighty-four thousand - - that's an eighty-four thousand dollar differential?

THE REFEREE: Do you know the terms of the sub-lease?

THE WITNESS: Yes.

THE REFEREE: How many years?

THE WITNESS: The sub-lease ends April 4th, 1975.

Q Have you been to the warehouse?

A No, I have not.

Q You have never been to this warehouse?

A No, sir.

Q Do you know what the sub-tenant has done in terms of installing heavy machinery in that warehouse?

A I only know through my conversations with the sub-tenant.

Q What has the sub-tenant told you?

A The sub-tenant indicated to me that they have some sort of manufacturing facility there, thatthey are in there rather heavily with their equipment and their lines, et cetera.

It happened that I talked to a man who didn't know. I can't tell you the exact structural changes that were made.

THE REFEREE: I think you answered that question.

Q Did the sub-tenant indicate to you they were concerned whether they would stay because they felt these proceedings have a cloud over Overmyer?

A The concern by the tenant as such was that they were looking for other accommodations as far away as San Antonio, Texas.

Q Hasn't that sub-tenant indicated to you they would be willing to stay if there was no problem with the rental or with the lease?

A Well, I have had substantial conversations with the sub-tenant and negotiations with them. I can't answer your question directly because it relates to the question of rental.

They felt they are paying an extraordinarily high rental, way above the market, and if that rental were reduced to something their headquarters back in Evanston, Illinois would accept, they would consider entering into a ten or fifteen-

year lease.

THE REFEREE: Despite the intrusion of their equipment in the building and the alterations?

THE WITNESS: They told me flat out they were willing to spend half a million dollars to go to San Antonio, Texas.

THE REFEREE: If you prevail in this case, are you prepared to recommend to your client they reduce the rent on a new sub-lease?

Q What is the name of the client?

A Jay Nigro. He is an attorney in Evanston, Illinois, the headquarters of American Hospital. And, I have negotiated with their Newark attorney whose name is Lee Sarokin.

Q Where are they located?

A 17 Academy Street, Newark, New Jersey.

Q Did you ever negotiate with any of the principals of the sub-tenant themselves?

A I believe those are the principals.

Q The two attorneys are also principals?

A Jay Nigro is an in-house attorney.

Q Mr. Stern, didn't you speak to Leon

Sena, an attorney employed by Overmyer, and tell him it's your feeling and your impression that the sub-tenant was going to stay or wanted to stay?

A I don't know who Mr. Sena is. I have never spoken to him, to my knowledge.

Q Mr. Stern, going back to that seven thousand dollars a month or eight thousand dollars a month - - the eighty-four thousand dollars a year differential, between what the sub-tenant pays and what you collect, didn't you several months ago write to the sub-tenant?

A I'm sorry, is Mr. Sena the gentleman who was sitting here?

Q Yes. Did you speak to Mr. Sena?

A Yes, but not by telephone. I spoke to him personally.

Q Now do you remember the conversation you had?

A Yes, I do. I met him. I did not know his association with the case in any way, shape or form, but I sat on that bench with him the last time I was here, and he said they are going to stay, aren't they, or something like that. I said, "I know they are in there fairly heavily, that I suppose

they were going to stay."

THE REFEREE: The Court surmises the same.

A That was prior to my conversation with Jay Nigro of last week.

THE REFEREE: At the beginning the Court got the drift of the line of this questioning.

Q Mr. Stern, didn't you instruct the sub-tenant in writing in September of 1973, to pay directly to you the rent which otherwise would have been paid to Overmyer?

A Yes, sir, I did.

Q Did they pay you that rent?

A No, sir.

Q Did you commence an action against them to collect that rent?

A Yes, sir.

Q What is the status of that action?

A It's embodied in the ejectment proceeding. You can see it. It's stayed along with everything else in this matter.

Q Did they ever attempt to tender to you a lower rent than the rent you asked them for?

A No, sir.

Q Did you ever negotiate with them for a lower rent?

A I negotiated - - in trying to get the higher rent I negotiated with them. We never got to any firm fixed dollars, all I did discuss - - I sort of moved over the fifteen thousand two hundred dollar gross figure they were paying and nibbled it down.

I believe I gave them a figure of fourteen thousand five hundred dollars. There was no affirmative stand to that.

Q Fourteen thousand dollars instead of fifteen thousand dollars?

A Fifteen thousand two humdred dollars. They did not accept it.

Q In any event, your testimony is you are now expecting to eject the sub-tenant because the sub-tenant is not paying you the fifteen thousand two hundred dollars that it had been paying Overmyer?

MR. BRECKER: Objection to the form of the question. Nothing has been said - -

THE REFEREE: Overruled.

A That is not actually true. I joined

them in the action because in an ejectment proceeding in New Jersey, I had to join the person in possession. I did not want to be bound in any way, shape or form by their sub-lease.

THE REFEREE: Well, you don't want them out?

THE WITNESS: No, I don't.

THE REFEREE: You certainly would like to see them stay in to the end of the term?

THE WITNESS: Yes, sir.

THE REFEREE: Do you think that you can get that rent from anybody else in New Jersey?

THE WITNESS: No, sir.

MR. BRECKER: They better not read this record, or we are all in trouble.

Q After the first letter in December of 1972, you wrote them a second letter on October 22nd, 1973, and you addressed it to Mr. Nigro and you said, "Dear Mr. Nigro, take notice that, on behalf of the owners of the referenced premises, demand"--

A That is correct.

Q This seems to be contradicting what you testified to in terms of your wanting them to

remain?

A No, sir.

Q Is it only that you wanted them to remain at the fifteen thousand two hundred dollar figure?

A No, sir, although we would like it. I don't want to be bound by the sub-lease and I have to give a notice to quit in order to bring my action. If you notice the date of that, that is October 22nd. I filed my complaint on October 25th.

The law in New Jersey requires a notice to quit be given in order to be able to meet the requirements of jurisdiction. I had to do that.

Q In what sense don't you want to be bound by the sub-lease? If you would accede to the Overmyer position you would be entitled to fifteen thousand two hundred dollars?

A The major consideration why I wouldn't want to step into the shoes of Overmyer in the sub-lease is that Overmyer was pre-paid ninety-one thousand dollars in rent in - - which is to serve as the last six months' rent, according to the sub-lease, which runs out September, 1974, through and of '74. I didn't want to be bound.

Q That was your motivation in attempting to sever the sub-lease, the relationship between you and the sub-tenant?

A That was one. There is another consideration in that I felt if I didn't make it clear to everybody concerned that I was severing that sub-lease, somebody might make an argument that the Overmyer lease was still in affect. I felt it was terminated and had to indicate that consistently.

Q You were not objecting to the fifteen thousand two hundred dollars a month rent?

A I would love it.

Q In fact, you tried to collect it?

A You would.

Q If you were able to collect that fifteen thousand two hundred dollars it would increase what you referred to as your cash flow by eighty-four thousand dollars?

A No, sir, it would not increase it by eighty-four thousand dollars.

THE REFEREE: Sixty thousand dollars?

THE WITNESS: Yes.

Q Do you consider this as something as substantial value to you?

A Absolutely.

Q If Overmyer were willing to cure all defaults at this time in response for your waiving any claims that the lease was terminated, would you accept this offer?

A No.

Q Why not?

A Because I don't feel (A) That I want Overmyer as a tenant. I feel that Overmyer gave us - -

THE REFEREE: Never mind, give me (B)? (B) is you would like to get that extra sixty thousand dollars?

THE WITNESS: Exactly.

THE REFEREE: Twenty percent of his return. So would I. I don't think anything pejorative is drawn by that.

Q Are you willing to pay any consideration for sixty thousand dollars a year additional income?

MR. BRECKER: Objection.

MR. SANDLER: If he says yes what is your objection?

THE REFEREE: I don't know why it's

important. I know it. Anyway, I will sustain the objection. I have a very clear picture here.

MR. SANDLER: Thank you, Your Honor.

THE REFEREE: I have a very clear picture if you don't put in any evidence.

MR. SANDLER: I haven't even started.

THE REFEREE: This is a very, very clear set of facts due to the candor of Mr. Brecker and his witness which just about goes to the very question you have been trying to raise with everybody else.

MR. SANDLER: No further questions.

MR. BLUM: I have questions on New Jersey landlord-tenant law. I think it's appropriate.

CROSS-EXAMINATION BY MR. BLUM:

Q Mr. Stern, you are familiar, are you not, with the New Jersey landlord-tenant law, the procedures in respect to landlords' and tenants' rights?

A Yes, I am.

Q First, let me ask, does a tenant in the State of New Jersey under a written lease have a

right of redemption after he is in default unless he specifically waives that right?

A Unless he specifically waives it, he might have it and it depends - - I am not trying to be coy with you, but it depends on the type of action that is brought.

If your reference is to a summary dispossess action, which is a statutory action, there are all sorts of what you might call equities of redemption. If you are talking about a full ejectment proceeding that sort of changes it.

Q Were you concerned with the type of termination that you had achieved or thought you had achieved when you sent out your notice on August 27th as far as whether or not this tenant had a right to redeem?

A I read the lease; I found three lease provisions where Overmyer waived their equity of redemption - - in Section 1505 they specifically and expressly waived their equity of redemption.

I was being very careful. If you will read my letter, you will see I protected myself all the way around.

Q I read your letter of September 10th,

which has been marked in evidence and it is - - it indicates in the last paragraph on the first page, basically, that the lease terminated as of the notice and that a date thirty days of this date shall be the affective date for termination pursuant to Section 1502 of said lease; that Section 1502 remedies are not exclusive, that summary dispossess proceedings are not necessary to affect termination of the sub-lease?

A That's a paraphrase of the lease?

Q Yes, sir. Now, would you look at Section 305 with respect to the tenant's right of redemption. It's the last paragraph to this exhibit page.

A Yes.

Q Read the last part which talks about the right of redemption.

A "Tenant expressly waives any and all rights of redemtion granted by or under any present or future laws in the event Tenant is evicted or dis-possessed for any cause, or any event of Landlord obtaining possession of the Demised premises, by reason of the violation of the Tenant of any of the covenants and condition of this lease, or otherwise."

Q You did not have possession of the premises when you sent up this letter of September 10th, did you, or not?

A No, I did not.

Q You had not secured an order of a court of jurisdiction in New Jersey for an order of summary dispossess, did you?

A At that point, I did not, no.

Q Therefore, when I asked you whether you had any doubt in your mind as to whether or not there was a right of redemption in this debtor as a tenant, you said you terminated many different ways?

A Right.

Q But, you did have doubts, did you not, since you knew you hadn't possession under that lease provision, nor did you have an order of a court terminating the lease, dispossessing the tenant and, perhaps, the tenant did have a right of redemption?

A You are wrong because you are reading a right to redemption much too broadly in leases in New Jersey law, especially with the history of the defaults in this case.

If you look at 1507 there was additional language with regard to waiver of equity of redemption.

If you look at the provisions of Section 1501, 1502 and 1503, you will see that the

landlord can go so far to step into the property, take it over and not terminate the lease. He has all sorts of options. In my personal opinion, in answer to your question, the landlord has extraordinary rights under that lease; it's an extraordinarily favorable lease to the landlord.

It was written by the tenant and in a commercial transaction, arms-length. It had a history of defaults by the tenant and no reasonable court, in my humble opinion, in New Jersey would judge this equity of redemption to ride in the tenants.

Q Just one point. You did not have possession, number one, and, number two, you don't want to leave this court, do you, with the impression that there has been a judicial termination?

A No, there has been no judicial termination.

Q And, in fact, that is why you brought your action for evictment, is that right?

A That's not true.

Q You didn't believe there was a termination sufficient to permit the landlord to do with the property as it wished?

A That is not - - it's only true to the extent American Hospital Supplies felt there was a cloud on the title and in my negotiations with them I couldn't get anywhere, so I brought the action.

Q I call your attention to the complaint. The complaint seeks damages from American Hospital Supplies. It seems to me you were bringing this action on behalf of the landlords because the landlords were not so sure they had a clear right to possession?

A The damages related to the October rent which is the rent they didn't pay me after I terminated the lease.

Q But, the notice of August 27th which is appended to your papers does not call for the payment of October rent, it calls for payment of rent before that date?

A I beg your pardon?

Q The August 27th notice of termination?

A Was not to American, that was to Overmyer.

Q You received money after that date, didn't you?

A No, I never received money - - there

was one payment, as I understand it, that was made in the gap, in the gap period, as I testified, between October 25th and November 16th, which went to the bank for the August mortgage payment. That's all that was received until December's use and occupation.

Q That payment was made at your insistance?

A What payment is that?

Q The forty-two hundred some odd dollars.

A I asked for all arrearages to be made up even after the termination. I didn't want to be left with a debt even though I felt I shocked Overmyer. I wanted the rent.

Q Did you know that payment had been made to the bank at the time you commenced your ejectment proceeding?

A It was my understanding it was made after. Perhaps I should back off from that and say to that extent I am not the bank and did not receive the payment.

It's my understanding that the payment was made in that gap period.

Q Did you ever cause this ejectment action to be served?

A Yes, I did.

Q When was it served?

A Service was in late October.

Q Do you know whether service was before or after the payment of the forty-two hundred dollars to the bank?

A I do not know of any forty-two hundred dollar payment at the time of service. I don't think - - as I say, I don't know when that check got into the bank.

MR. BLUM: I believe that will be all.

MR. SANDLER: I have one or two more questions.

THE REFEREE: No.

MR. BRECKER: I have a few questions.

RE-DIRECT-EXAMINATION BY MR. BRECKER:

Q How much, if anything, did the landlord pay or what was the consideration as to the purchase of the property, by the landlord, other than the cash to which you have testified?

A That's all.

Q Didn't they take a mortgage or take subject to a mortgage - -

MR. SANDLER: You are leading.

MR. BRECKER: I withdraw the question, then.

Q What did the landlord pay or was there any other consideration?

A The total purchase price was seven hundred seventy-eight thousand dollars.

Q Of which how much was cash?

A Two hundred seventy-eight thousand dollars.

Q Was the balance a mortgage?

A Yes, sir.

Q What improvements, if any, do you know of that were made to the premises by the tenant, Overmyer, excluding any improvements made by the sub-tenant during the intervening period between the execution of the lease and the within arrangement proceeding?

A I know of none and, in all fairness, I would not know of any.

MR. BRECKER: Then I would withdraw the question.

RE-CROSS-EXAMINATION BY MR. SANDLER:

Q Mr. Stern, can you tell us the terms of the five hundred thousand dollar mortgage?

A I believe it was a twenty-year regular reducing mortgage. I think the rate was - - I have it somewhere - - it was a favorable rate, eight and a half percent.

Q You are happy with the rate?

A Yes, I am.

Q Now, the total price was seven hundred seventy-eight thousand dollars, is that correct?

A Yes, sir.

Q When that property is depreciated for tax purposes, is the depreciation based on the total price less only the land?

A Yes, sir.

Q Do you know how much was allocated to land?

A Seventy-eight thousand dollars.

Q You were depreciating based on seven hundred thousand dollars?

A Correct.

Q Were you depreciating on a declining rate?

A No, sir.

MR. BRECKER: I object to that question and move that the answer to the previous

questions respecting depreciation - -

MR. SANDLER: Mr. Brecker opened the door as to the total sales price, not the lease price, and he brought in the amount of the mortgage.

THE REFEREE: I don't, frankly, see - - counsel, if the landlord made a good deal for himself - - people are in business and he is in here to make money. I just don't at this point want to hear what he gets tax-wise or depreciation-wise.

MR. SANDLER: We want him to get exactly what he bargained for. We don't want him to get more.

THE REFEREE: That's your appeal to me. I don't think it has any warrant to this course unless you have something material on a matter gone into on direct. Otherwise, that ends it. We have taken too much time with this case.

MR. SANDLER: I have one final question which is relevant.

Q Mr. Stern, you testified, and annexed is a schedule to your complaint, about arrears of

approximately twenty-one thousand dollars?

A As of the filing of the ejectment action.

Q Yes, and subsequent to that, approximately forty-two hundred dollars was made?

A Yes.

Q So that the balance is approximately seventeen thousand dollars, roughly, is that correct?

A The total arrearage that I have through November is twenty-seven thousand dollars.

Q Would you tell me how you get that, please?

A The basic rent on the basis of four months' rent at a figure of two thousand eighty-three dollars point thirty-three cents, which is eighty-three hundred thirty-three cents and thirty-two cents. The mortgage which is on the basis of three months, September, October and November, at whatever it was, forty-two hundred dollars, plus twelve thousand eighty-seven dollars and fifty-one cents.

The tax escrow amounted to something like sixteen hundred dollars per month for four months which is sixty-six hundred sixteen dollars and fourteen cents through November of 1973. I have

a figure of twenty-seven thousand six hundred thirty-seven dollars and twenty-seven cents.

Q Tell me what the twelve thousand six hundred eighty-one dollar figure is?

A Mortgage payments of forty-two hundred plus dollars for three months.

Q You have about twelve thousand six hundred dollars in mortgages and eighty-three hundred dollars in rent which is about twenty-one thousand dollars?

A Yes, sir.

Q How did you get on to twenty-seven thousand dollars?

A The tax escrow payment of sixty-six hundred sixteen dollars and forty-four cents.

Q You know as an attorney, don't you, when a bank collects taxes they are always a couple of months ahead of you, is that correct, with respect to what is due to the taxing authorities?

A That is certainly true.

THE REFEREE: Certainly we have twenty-one thousand dollars less forty-two hundred dollars.

MR. SANDLER: Yes.

THE REFEREE: That's six thousand dollars.

MR. SANDLER: Yes.

THE REFEREE: Isn't that enough?

MR. SANDLER: Yes.

THE REFEREE: How many bullets do you need to kill anyone?

MR. SANDLER: No further questions.

THE REFEREE: Thank you, sir.

MR. BRECKER: I think I indicated, Your Honor, this would be my only witness.

MR. SANDLER: Now, can I talk to Mr. Brecker for two minutes.

(At this time, a short recess was taken and all parties subsequently returned.)

S I D N E Y P. H I L L E R, having been duly sworn by Honorable Roy Babitt, was examined and testified as follows:

THE REFEREE: Please give your full name and home address to the reporter.

THE WITNESS: Sidney P. Hiller, 5 Barbara Lane, Montvale, New Jersey.

DIRECT-EXAMINATION BY / R. SANDLER:

Q Mr. Hiller, was is your profession?

A I am in the real estate appraisal and consultant business.

MR. BRECKER: I will stipulate the witness is qualified to appraise real estate.

MR. SANDLER: And is an expert?

MR. BRECKER: And is an expert thereby being an expert.

Q Where are you presently employed?

A I am the president of North American Research & Appraisal Corporation, Paramus, New Jersey.

Q Did your company have occasion recently to do an appraisal of the warehouse which is the subject of thisproceeding?

A Yes.

Q When was that appraisal done?

A The original appraisal was done in the fall of 1973 and in the last week I had inspected the site and reviewed the appraisal and put my name to it.

Q When were you personally at the warehouse?

A Last week, I believe it's the 17th of

January.

Q Did you prepare a written appraisal based on your latest visit to the site?

A Yes.

Q Did you personally prepare it?

A Yes.

Q What is the date of that appraisal?

A The date of the appraisal is January 17th, 1974 and contains the value of the subject property as of July 1st, 1973.

Q Can you tell us based on your personal inspection of the premises as well as what is contained in the written appraisal before you and any other data that you may have as to whether or not you have an opinion as to the value of the Overmyer leasehold?

A Yes.

Q What is that opinion?

A The Overmyer leasehold estate is valued at seven hundred five thousand eight hundred dollars.

Q Do you have with you, which I have in front of me, a copy of the written appraisal?

A Yes.

MR. SANDLER: I offer at this time the written appraisal personally signed by the witness, dated January 17th, 1974.

MR. BRECKER: Your Honor, rather than conduct a voir dire can we suspend on a ruling on this until Have had an opportunity of cross-examination?

THE REFEREE: No. He has testified he physically appraised the property himself.

MR. SANDLER: Yes.

THE REFEREE: You may take your voir dire now.

MR. BRECKER: Thank you.

VOIR DIRE EXAMINATION BY MR. BRECKER:

Q Mr. Hiller, on which days did you visit the subject property?

A One day. That was a week ago, Thursday.

Q How long did you spend at the subject property?

A Approximately an hour.

Q Who did you speak with at the subject property?

A I spoke with a Kenneth Grushevsky

(phonetics) - - I believe that's how he pronounces his name, and one other.

Q Who was the maintenance superintendent at the building?

A I spoke with a Kenneth Grushevsky who, I believe, is the plant manager and one other gentleman whose name I don't remember. I mean, he is the maintenance superintendent or manager of the operations down there for American Hospital.

Q What else did you do during that hour besides observe and speak to these two gentlemen?

A I inspected the building on both the interior and exterior and the general areas in which it's located.

Q Now, what, if anything, did you do other than what you have described to us during that approximately one hour so as to enable you to prepare the appraisal you referred to other than relying on your own experience, background and education?

A I proceeded to - - we had in our files sales and rental information that had been obtained from real estate brokers in the area. I called various real estate brokers that had provided us with the information and to speak with the broker

involved in the transactions, to confirm the sale and the lease value that they had been a part of.

Incidentally, that work was not done during that hour but done prior to and after my visit to the plant.

Q I refer you to page ten of this appraisal which has been handed to me and ask you whether you have examined the comparable leases identified as 1, 2 and 3 on page 10?

A No, I have not.

Q I refer you to a summary of rental values - - I'm sorry, I can't give you the page but I can refer this to you (indicating) - -

A Page 11.

Q And, I ask you how this was prepared?

A What do you mean how it was prepared?

Q How did it get to appear on this page of the appraisal, other than, of course, typing by a secretary? How was the information derived?

A The information was taken from the leases that are listed on page 10 of the report and are broken down into the various categories that we felt were indicators of what might warrant an adjustment in either the lease rent due to the time the

lease was signed or due to the fact that there were differences in the physical size or construction of the various buildings.

Q Now, you refer to leases which you just testified you have not examined, is that not correct, sir?

A Yes.

Q On pages 7 through 9 of the appraisal where are references to sale 1 through sale 4. Now, page 9, perhaps, is not included here. Perhaps we should stop at A.

How did you arrive at or did you arrive at the terms and conditions of the sales 1 through 4 which you refer to?

A The information regarding the sales was obtained from the selling broker and the discription of the property was obtained from the selling broker, and a physical inspection of the property had been made to determine whether or not the various physical conditions as stated were correct.

Q Then, it is your information derived from two sources, what was stated to you by another broker and a physical inspection?

A Yes.

Q Sir, did you personally make the physical inspection?

A Yes.

Q When did you make the physical inspection of the land located on the northeast corner - -

THE REFEREE: I think we are reaching the point where you are cross-examining and going beyond a voir dire. You have gone far enough to articulate an objection or not as to the admissibility.

MR. BRECKER: I can go further. But, I will spare the Court's and counsels' time from going detail by detail.

It seems to me there is much in this very lengthy document which is not capable of admission in evidence had the witness been asked the questions and testified. I am not at this time objecting to any testimony adducing value that the witness might give, but I certainly object to the document being admitted in evidence.

THE REFEREE: It's true there is a lot in the makeup of an appraisal by any appraiser that's doing his job properly, from this

Court's experience, in being able to come to his own valuation, and I think there would be not one appraisal, substantial appraisal, which would not be susceptible of objection because the information or informants upon which the appraiser necessarily worked are not before the Court.

I am going to overrule the objection and accept this document into evidence. So far as I am concerned, I want to get to the proof of how he gets to valuation apart from this. I want to get his formula.

(At this time, the said document was so marked as Receiver's and Debtor's Exhibit "A" in evidence.)

THE REFEREE: I am not all that sure it would not be advisable in cases where an issue is raised as to valuation of the leasehold, that it would not be better for the Court to have its own disinterested appraiser who is not being paid by the debtor, et cetera. So be it.

Would you now get to what I consider the nub of that appraisal, that valuation of seven hundred thousand dollars on the basis

of leasehold interests.

RE-DIRECT-EXAMINATION BY MR. SANDLER:

Q Would you explain how you arrive at a value of approximately seven hundred thousand dollars for the leasehold interest?

A Basically, we did two approaches to value, the cost approach to value - - I would like to skip through that because the property is generally income-producing in nature and we have depended upon the income approach to value for the final value conclusion.

In the income approach to value what we did is attempt to go into the market place and see what we could find in the way of comparable leases, which we have done, and have illustrated those on page 10 of the report. Page 10A contains a brief summary of the lease on the subject property which is leased to American Hospital Supply.

THE REFEREE: Do you know how much is reserved under the lease; how much does American Hospital pay?

THE WITNESS: The basic lease calls for a rental of two dollars and twenty-five cents per square foot with an annual adjust-

ment for a cost of living increase. The sub-tenant was to pay a tax increase over the 1969 base year. The landlord's maintenance takes care of the structural maintenance, and the tenant takes care of the general maintenance.

THE REFEREE: How many feet does it utilize?

THE WITNESS: Two hundred forty thousand squrre feet plus twelve hundred twenty-five square feet of office, plus the yard outside. The three leases that I had used and made adjustments to, to bring them in line with the subject property, are listed on page 10.

THE REFEREE: Mr. Brecker has already noted you didn't study the leases. What information do you have from those leases on which you can gauge?

THE WITNESS: From the three leases that were compared with the subject property?

THE REFEREE: How were they compared? You never saw them.

THE WITNESS: They were compared with

the property I have seen; they were compared with respect to building areas, the size of the buildings. Two of them were in the eighty thousand square foot category and one was a thirty-two thousand square foot building.

The ages of the buildings were all from one year to four years old.

THE REFEREE: What geographical area?

THE WITNESS: They are all in the Edison-Woodbridge area.

THE REFEREE: Of New Jersey?

THE WITNESS: Fairly close to the subject property. I think the furthest one away was about three or four miles.

THE REFEREE: How do you know what was reserved under those leases if you never saw the leases? How do you know what was being paid here per foot?

THE WITNESS: The information came from the brokers.

MR. BRECKER: I move that be excluded as absolutely hearsay.

THE REFEREE: There is no doubt it is

absolutely hearsay; there is just no way that an appraiser going out on a job like this is not going to have to rely on what the market place is, and the Court is going to overrule your objection for the same reason it overruled the objection to the appraisal itself.

MR. BRECKER: There is no exception to the hearsay rule.

THE REFEREE: I just made one. There is no other way to comply with Section 70 of the Bankruptcy Act, Mr. Brecker, that I know of. I have handled hundreds and hundreds of appraisals in this court.

While we are not appraising a machine that a guy goes to see, even an appraiser of a machine, a Landes, in a shoe factory, goes to the book, the red, green, purple. That's as much hearsay as a broker's information.

MR. BRECKER: I haven't been argumentative with your ruling. Permit me to be heard on this one subject.

We are not appraising property for

the purpose of deeming whether the Court should or should not approve a sale. We have an adversary proceeding in the nature of a trial where the debtor is attempting to prove the value of certain property based upon its capability of producing income.

THE REFEREE: True.

MR. BRECKER: The evidence they are offering, the evidence of similar leases which nobody has read and examined - -

THE REFEREE: That will go then to the weight I give the appraisal altogether.

MR. BRECKER: The rules of evidence strictly state hearsay evidence of a probative transaction is strictly excluded by law. Then they say - -

THE REFEREE: I will consider hearsay in determining its weight.

MR. BRECKER: Most respectfully, you are disregarding the rules of evidence.

THE REFEREE: There is no doubt technically you are right. I think this man is susceptible of the most searching cross-examination as to the comparables and weight

he gave them and to the extent he studied them.

You know I can't put great weight on something someone may have told him. This is not the best way to get an appraisal in evidence, but I don't think we have a choice.

I think you can cross-examine him to a fare-thee-well.

MR. BRECKER: I am not alluding to the document in evidence, I am alluding to the testimony.

THE REFEREE: How is he going to give me a formula?

MR. BRECKER: He can't. If you allow them into evidence, he has given you a formula inadmissible, and I invite counsel to get up and give some substantiation.

THE REFEREE: He's as stuck as you are. I don't know why we have got into the appraisal business to start with. I haven't found his appraisal in any instance to be satisfactory.

What do you want me to do on an appeal to the Court's conscience except to consider

a man who in good faith goes out to do a job. Do you want me to ignore him completely?

MR. BRECKER: Yes, Your Honor.

THE REFEREE: I will strike all of the testimony relating to how he got there. Does your appraisal show you have come to a seven hundred thousand dollar value to the leasehold?

THE WITNESS: Yes.

THE REFEREE: Are you finished with this witness? I will sustain all objections by Mr. Brecker as to any evidence of how this witness got to seven hundred thousand dollars. What do you want, Mr. Blum?

MR. BLUM: I want to know whether there could be any testimony adduced on the value of the building - -

THE REFEREE: Your value of this leasehold is seven hundred thousand dollars. This is based upon your appraisal and physical evaluation of the premises and the examination of the lease with the sub-tenant, right?

THE WITNESS: Yes.

THE REFEREE: You are not going to go into the examination that Mr. Blum is talking

about?

MR. SANDLER: No, unless Mr. Brecker goes into it.

CROSS-EXAMINATION BY MR. BRECKER:

Q Mr. Hiller, you just stated that the Overmyer leasehold estate value is approximately seven hundred thousand dollars. I know you gave a specific figure.

The question I put to you is are you saying that the lease which Overmyer allegedly owns is worth seven hundred thousand dollars?

A Not necessarily.

Q Are you saying that the lease which Overmyer allegedly owns if it's assignable can be assigned or sold to someone for seven hundred thousand dollars?

A No.

Q Can you explain to the Court or, at least, to me, what is worth seven hundred thousand dollars?

A The rights that the tenant, Overmyer, has to continue sub-leasing that property for a period of so many years into the future at a rental in excess of the rental he is paying to the property owner.

THE REFEREE: How far into the future can you peer? I can't peer ahead to tomorrow.

What gives an appraiser such a sense of prognostication?

THE WITNESS: Well, at any given point in time we try to project what the future will hold. The lease period - -

THE REFEREE: Thirty odd years?

THE WITNESS: Thirty years including the ten-year option.

THE REFEREE: Don't you have to assume he is going to get at least a tenant over the next twenty odd years at least comparable in quality to what is there now?

THE WITNESS: Yes.

THE REFEREE: How can you do that? The lease, we know, is fine, it fixes terms. How do you know what is going to happen tomorrow, next year, or what?

THE WITNESS: We don't, Your Honor.

THE REFEREE: It's very possible that in a year or two years from now it - - a condition will exist? An appraisal is as good as of the date it's made.

THE WITNESS: In a year or two years the value may not necessarily be the same.

THE REFEREE: But, not necessarily such augmentation. This is worth seven hundred thousand dollars to a purchaser today?

THE WITNESS: No.

THE REFEREE: When you put a value on this of seven hundred thousand dollars, what are you talking about, Overmyer's right to sell it, assign it?

THE WITNESS: No.

THE REFEREE: What does it mean?

THE WITNESS: The fair market value of the leasehold which, presumably, would be the value he would obtain if he did sell it.

THE REFEREE: He could conceivably get the fair market value, which is seven hundred thousand dollars, from a purchaser on that lease?

THE WITNESS: Yes.

Q Mr. Hiller, what investigation have you made or what facts or circumstances do you base your opinion or conclusion on that this lease could, in fact, be sold if it was assignable for approximate-

ly seven hundred thousand dollars?

A I did not ascribe a value to the lease, but to the leasehold. The lease, I believe, only has another year to run.

Q I meant the leasehold; I am talking about the leasehold from Lazar, et cetera, to Overmyer which, I believe you have said, could be sold for approximately a hundred thousand dollars.

My question to you is what investigation have you made and what facts or circumstances are you relying upon in giving your opinion of value?

A The facts and circumstances contained in my appraisal report.

Q Now, I want you to please recite them to me and I will help you. One is your physical observation and inspection of the premises, is that correct?

A Yes.

Q Is another the lease between the sublesse, between Overmyer and its present sub-tenant?

A That was considered but not used as the prime basis for valuing the property.

Q Was the physical condition and your observation the prime basis or was there some other

prime basis in arriving at your opinion?

A The existing lease supported what I had deemed to be comparable leases that I found in the market place, and it is that fair economic fair rent that the property would be entitled to if it were leased on a long-term basis to another sub-tenant.

It is that additional income which would be over the excess over what Overmyer would pay that I added to the value.

Q Doesn't this all depend on the comparable leases that you make reference to?

A The comparable leases and a lot of guesswork into the future and, in part, the subject lease.

Q Are not these comparable leases the leases upon which on two occasions you stated you never examined but the terms of which were related to you by brokers in the market place?

A Yes.

MR. BRECKER: Your Honor, I respectfully submit that the opinion stated respecting value of this leasehold cannot be supported except by recourse of inadmissible evidence

which you have expunged, and I ask that the testimony respecting the value of the leasehold be stricken.

MR. SANDLER: This witness did not recite his qualifications today but as I recall, he has spent the last seventeen years of his experience - -

THE REFEREE: And I asked how do you get to the seven hundred thousand dollars. If he got to the seven hundred thousand dollars by access to clearly inadmissible proof, in other words, what someone told him what would be - - what would be the difference if he never filed an appraisal at all and had merely come into court to testify?

MR. SANDLER: The difference is - -

THE REFEREE: And I say you have appraised value at seven hundred thousand dollars. Then I ask how did you get to that and he says people told me.

I think these people would not be admissible, and I held them inadmissible last time on the basis of what I know about appraisals since I have been in this court.

On the basis of the testimony I heard I am prepared to accept this appraisal but as nothing more, really, than an appraisal really is, an educated guess and a hope, and in this case it's accentuated by the fact that the material he used in immaterial.

If I send an appraiser out and he comes in to me with these other leases and brokers I have got admissible evidence. This is not only a guess, but it's based upon totally inadmissible information given him to support the guess.

I am going to, right at this point - -

MR. BLUM: Let me make an observation before you rule.

MR. SANDLER: The point is, Your Honor, that - -

THE REFEREE: I have never taken anything away from the qualifications of Mr. Hiller. This is still a court of law governed by rules of evidence.

MR. SANDLER: I agree. While Mr. Brecker very cleverly, from his point of view, focuses on one aspect of the appraisal,

there are many other parts of the appraisal.

THE REFEREE: On cross-examination let him get to some of the admissible bases upon which the conclusion is reached. I will reverse myself on admitting this and hold this in abeyance and let him continue on the value.

If this man were to testify and said he saw the property and valued it at seven hundred thousand dollars, we would not have a problem except on your examination of how he gets there, is that right?

MR. BRECKER: Right.

THE REFEREE: Let us proceed on that assumption.

MR. BRECKER: I don't understand your ruling. Is the appraisal in or out of evidence?

THE REFEREE: At the moment I am going to hold inadmissible the appraisal, but the witness is here who can testify as to how he got to the figure.

MR. SANDLER: The fact of the matter is in addition to his qualifications and in

addition to the fact you are observing him as a sworn witness, in addition to all the ingredients that go into his professional opinion, the comparable leases are only one element.

THE REFEREE: I want to hold apart the ruling on the admissibility. At the best it would have very limited probative value, as I just told you. I want to know how he gets to the seven hundred thousand dollars on the basis of competent evidence - - his own observation, his own evaluation. I want to know.

MR. BRECKER: But I was just contemplating - - I don't know whether I have any more questions - - he just answered that he has stated, I believe - - and I am not trying to characterize the evidence - - that his appraisal as to the value of the leaseholds was based upon income-producing properties.

MR. SANDLER: That was one of the elements. You are distorting by emphasizing only that which is favorable to you. The

fact is when you were here last time the fact you objected to was he wasn't even there.

Q Mr. Hiller, have you read the lease-hold agreement between Overmyer and Florence Lazar?

A No, I haven't.

Q Have you, Mr. Hiller, read the lease modification, which is Exhibit "1A"?

A No, I have not.

MR. BRECKER: No further questions.

RE-DIRECT-EXAMINATION BY MR. SANDLER:

Q Mr. Hiller, where does your company have its place of business?

A Paramus, New Jersey.

Q Where do you live?

A Montvale, New Jersey.

Q How far is your place of business from the Edison-Woodbridge area?

A Approximately forty miles.

Q Aside from the work you have done in connection with this appraisal, based on other work you have done, based on where you live and based on where you are working, do you have a general knowledge of rental values for warehouse space in this

area?

A Yes, I do.

Q That information is of your own personal knowledge?

A Yes.

THE REFEREE: Mr. Hiller, do you do any other appraisals in real property and leases - - do you appraise machinery, equipment?

THE WITNESS: Yes, sir, we have done machinery and equipment. We have machinery and equipment men with our firm.

THE REFEREE: And you are not exclusively involved in this type of work, are you?

THE WITNESS: Probably ninety-five percent.

THE REFEREE: In other words, you operate on this kind of appraisal work, warehouses?

THE WITNESS: We do shopping centers and a lot of governmental work.

MR. SANDLER: Your Honor, I at this point, if you will take two minutes of argu-

ment, think that the witness has been over-qualified, if anything.

THE REFEREE: There is no doubt about that. Nobody quarrels with that.

MR. SANDLER: The comparable leases, Your Honor, are one element of an appraisal and if there is a cloud over that one element, you can still decide based on these others.

THE REFEREE: Well, this is over-simplified. You are making this a question of weight - - what number should I substitute on this if I do not know how much he relied on and what is inadmissible? You want me to conjecture.

I think that the appraisal itself resting on inadmissible opinions with this - - this is no more admissible. Nobody has quarreled with his qualifications; Mr. Brecker has conceded them.

The fact of the matter is if he did not file a written report of an appraisal, he could not now testify, could he?

MR. BLUM: Yes, he could.

THE REFEREE: Stop it, Mr. Blum. He could not now testify orally as to what someone told him as a basis for coming to a number. Do you think this becomes more valid or probative or is in this instance entitled to more weight because he had it typed up?

MR. SANDLER: We just elicited testimony on this one aspect of appraisal. He does know of his own knowledge.

THE REFEREE: I don't know how much of that seven hundred thousand dollars rests on inadmissible opinions. That is like a jury getting inadmissible evidence and nobody can ever tell how much was relied on to reach the verdict.

I am goint to - -

MR. BLUM: Are you going to hear him on this?

THE REFEREE: No, I am not.

MR. BLUM: I must be heard on this.

THE REFEREE: I heard you argue last time on the same point.

MR. BLUM: I haven't had an opportunity to cross-examine.

THE REFEREE: You are not getting it.

MR. BLUM: I must have an opportunity to ask one particular question.

THE REFEREE: If you have put all your eggs into one basket - -

MR. BLUM: I want to ask one question.

THE REFEREE: Ask it.

DIRECT-EXAMINATION BY MR. BLUM:

Q The comparable leases on page 10 of your appraisal, let us assume that you have never seen these properties but let us assume that the facts as set forth in page 10 are correct.

Do you have an opinion as to the value of the rental with respect to property located in Edison, New Jersey assuming you have an eighty-eight thousand nine hundred seventy-five square foot warehouse with a ten-year lease signed in 1970, at one dollar thirty-six cents a square foot, and that the building is twenty feet high, sprinkled with a rail siding built in 1970 - - do you of your own knowledge have any idea of what the fair rental value of a real piece of property in Edison, New Jersey of this type would command from your experience in your association with North American

Appraisal & Research Corporation or any other customer?

THE REFEREE: Together with your personal observations?

MR. BRECKER: I would have no objection to this question except that the base lease that counsel is asking for an opinion on is not a description of the lease that is the subject of this lawsuit but a description of one of the comparable leases. Why he is doing it, I don't know.

MR. BLUM: It's a hypothetical question.

MR. BRECKER: If counsel had asked whether assuming the facts asserted to be involved in the comparable leases were to be correct what value would the lease before the Court have, or the leasehold interest, then I would not have objected.

MR. BLUM: Judge, I think I laid a foundation for the assumption which is better than what Mr. Brecker - -

THE REFEREE: The objection is overruled.

MR. BLUM: I would like an answer, Judge, on the values compared with the items as set forth on page 10.

A The property as you described would probably lease today in the market for approximately one dollar and fifty cents to two dollars a square foot depending upon whether it was a net or gross lease.

Q The top one being if it was gross and the bottom one being if it were a net lease?

A Correct.

Q With respect to lease 2 you haven't seen the lease. Did you see the property?

A Yes.

Q I ask you, there is a one dollar and forty-five cent figure inserted on page 10 of your appraisal.

We have an eighty-five thousand eight hundred square foot building in Woodbridge, New Jersey, sprinkled and built in 1970 - -

THE REFEREE: He knows what it is.

Q Do you know of your own knowledge what the rental value is today in Woodbridge, New Jersey for a property of this type?

A Yes.

Q Would you give the Court your opinion?

A That would be approximately the same as the previous property, about one dollar fifty cents to two dollars a square foot depending upon whether it was a net or gross lease.

Q Would your answer be the same with respect to lease 3, assuming I present to you the same type of hypothetical question?

A Number 3?

THE REFEREE: That's thirty thousand feet; it's about two-thirds less.

A I was going to say it would be approximately twenty percent, or so, higher probably in the range of one dollar seventy cents to two dollars fifty cents a square foot.

Q You saw that building, didn't you?

A Yes.

Q This information you are now giving to the Court is based on your own personal knowledge of rental values in these three areas?

A Yes, sir.

THE REFEREE: What do you know about availability; what do you know about available

tenants in that area; what do you know about the areas that you of your own knowledge know; what about the quality of tenants?

THE WITNESS: Well, quality of tenants would have an affect upon the lease value and in all cases I presumed it was a grade A tenant that would be leasing the premises. If it was a financially weak tenant, the rental rate would have to be higher to compensate for the risk.

THE REFEREE: Do you think you could get that high a rental?

THE WITNESS: Oh, yes. There are properties being leased today at rates that are far in excess of that. Particularly, if you come a few miles north, the base lease starts at well over two dollars a square foot.

THE REFEREE: What is the closest projection you make on any of these appraisals you do here or elsewhere as to long-term thirty-year leases? How do you project?

THE WITNESS: The assumption in most any appraisal is that the property will con-

tinue to have an economic life for so many years into the future. That's primarily based upon its design.

If it's fairly modern in design and has no existing obsolescence and is in fairly good condition, depending upon the use it's built for, you could very well estimate it would have a continuing use for, say, the next thirty years.

THE REFEREE: Do you have a reason to suppose that warehouse space would be desired in the next thirty years or just that this building if it were desired in twenty-five years would be around to service needs? Which is it, the building?

THE WITNESS: The building won't fall apart and can still be used thirty years from now for its purposes today, yes.

THE REFEREE: You don't know anything about the grade of tenants, or anything in the future about the economics of this country or that - - you are merely guessing?

THE WITNESS: Yes.

THE REFEREE: You are looking at a

concrete building and saying barring an atom bomb, the building will stand and will be used as a warehouse?

THE WITNESS: Yes.

MR. BLUM: I think the Court can take judicial notice of one fact here, when you have what is commonly described as a triple A tenant, A&P or General Motors,I think it goes without dispute they would pay a lesser amount per square foot because of the value of the tenant itself now.

THE REFEREE: How do we know the economics of this country won't in three years sell warehouse space to the best tenant for half?

MR. BLUM: If I were permitted to ask this witness a question on the economy, then

THE REFEREE: You have bothered with this appraisal and I still can't fathom it, do you understand?

Go ahead, Mr. Brecker.

CROSS-EXAMINATION BY MR. BRECKER:

Q Mr. Hiller, in the past twelve months

how many leases have you personally examined for warehouse space in Middlesex County, New Jersey?

A I can't answer that. I really don't recall whether I have or have not examined leases themselves in Middlesex County.

Q Let me expand that to twenty-four months instead of twelve months. Would your answer change?

A I can't answer that. Our firm is - -

Q You personally, sir.

A If I may answer the question - - our firm is very active throughout the state including Middlesex County. We in the last two years completed four, I believe, complete reassessment programs for municipalities in Middlesex County.

During that time lease information, cost information, market information has come across my desk and in large quantities. I can't recall any specific leases or the specific numbers.

Q Now, I ask you the same question but qualify it to outer - - counties adjacent to Middlesex but locations which you would consider to be comparable to this Edison location which is involved in this lawsuit.

How many leases for the rental of warehouse space have you signed in these adjacent counties in the last twenty-four months, you personally?

A I can at best give an educated guess and say perhaps a dozen full leases. There were, perhaps, fifty to one hundred quotations on rentals which were given to me by either word or mouth or a written letter from a broker or a participant in the deal - - either the lessee, the lessor or owner of the property.

But, the leases themselves perhaps a dozen at the most.

Q Let's focus on the dozen. Do you have a firm recollection of, or are you, in fact, guessing - - I am not pinning you down to twelve rather than eight or twelve rather than fourteen - - I am using a general number?

A I am only guessing as to the number.

MR. BRECKER: Then, I move that the answer be stricken as a guess.

THE REFEREE: Granted, strike the answer.

Q Does your firm act as a broker in the

sale of or lease of real property?

A Not North American Appraisal. I am also the president of General Realty & Development Corporation.

Q Does that corporation involved itself in acting as a broker for the sale or rental of real property?

A Yes.

Q Have you personally brokered a deal within the last twelve months where a lease was either executed or assigned for warehouse space in Edison Township or in Middlesex County with a building comparable to this subject premises?

A No.

Q In the event a leasehold contained terms and conditions and provisions which were particularly onerous to a tenant and it's a long-term leasehold - - let's assume it's a thirty-year leasehold - - and these terms are not the standard terms found in printed lease forms which are printed by various publications or form companies - - I know we have them in the city, such as Blumberg or the New York State Real Estate Board - - would these onerous terms have an affect on the value of this

leasehold for the purpose of it being - -

MR. SANDLER: I object, Judge, too vague.

THE REFEREE: Absolutely.

MR. BRECKER: No further questions.

THE REFEREE: I am going to adhere to my ruling that the appraisal rests on inadmissible underpinnings and is not given any greater value merely because it's typed up rather than having the witness testify to it.

I am, therefore, going to withdraw my prior ruling where I admitted it in evidence. Unfortunately, it would have some semblance of weight if there was some way that the Court could gauge, which it can't how much of that valuation rests on what is totally not before the Court. I agree that all appraisals are guesswork, they have to be by their nature.

I would have no objection to receiving an evidence an appraisal or testimony which acknowledged there has to be guesswork when we are projecting. When you are asking me to

take a number which is gauged on what this man was told by others not before the Court, or on the basis of an agreement, or what others did, other people not before the Court, you are asking for too much.

MR. SANDLER: If Your Honor please - -

THE REFEREE: I don't want to hear further argument. That is my ruling.

MR. BRECKER: I have another motion.

THE REFEREE: You will, therefore, strike all of Mr. Hiller's testimony. I believe it adds nothing to this case.

MR. BLUM: I would ask Your Honor to permit us to go up on this ruling alone.

THE REFEREE: You can't. It's not interlocutory; you have to wait until the decision comes down. The application is denied.

MR. BRECKER: All of his testimony has been stricken?

THE REFEREE: Well, I don't know what probative value there is to any of Mr. Hiller's testimony if we knock out his appraisal. It's the number I am interested

in.

MR. SANDLER: You have now stricken all of the testimony, most of which is based on personal knowledge, specific personal knowledge, because of one element.

THE REFEREE: Mr. Sandler, I don't want to argue with you. There is only one thing in this man's testimony that has any interest to me in this case, the value ascribed to the lease. His qualifications I am not quarreling with; his personal observations of the building, his examination of it, his knowledge of generally what is going on. None of that troubles me.

I am interested in one item, what is the fair value of this lease so I can know what I have got to do, and it rests on inadmissible underpinnings, and that being so, his testimony has no value. If you want, I will leave it in and strike from the record everything relating to value or how he got to the value of the lease.

MR. BRECKER: May I be heard respecting a motion to strike?

THE REFEREE: Yes.

MR. BRECKER: Your Honor, I am referring to specifically answers to the hypothetical questions based upon my cross examination of - -

THE REFEREE: There is no value, that goes out, too. It does give me a bottom line.

MR. SANDLER: On the one point of the three comparable leases the witness has testified that he knows, he inspected those three buildings personally.

THE REFEREE: He inspected the buildings?

MR. SANDLER: The buildings, and that he knows from his own personal experience and his knowledge of conditions in the state of what the comparable rentals should be for those buildings.

THE REFEREE: What hurts this appraisal is not only that it rests on inadmissible underpinnings but its whole merit is based upon a conjecture into the future. It weakens it too much to have any probative

value.

MR. SANDLER: It speaks as of this moment.

THE REFEREE: I am holding to my ruling and deeming the appraisal to be inadmissible. I am striking all of Mr. Hiller's testimony save he personally went to the premises, personally studied the premises, personally has knowledge of what is going on in that township, in that area for comparables.

MR. SANDLER: Are you striking the fact he has an opinion as a professional as to whether this has a value?

THE REFEREE: I am striking his opinion with, I think he will agree, - -

MR. SANDLER: But, which part, his five percent or - -

THE REFEREE: That is the whole point. I have made my ruling. Will you sit down, Mr. Blum?

MR. BLUM: If Your Honor please - - I will sit down, Judge.

THE REFEREE: Are you ready to pro-

ceed?

MR. SANDLER: In view of your ruling we need a consultation with each other.

THE REFEREE: Let's take a short recess.

(At this time a short recess was taken and all parties subsequently returned.)

MR. SANDLER: If Your Honor please, I would like to recall Mr. Hiller for one question in an effort to overcome the problem we have had.

THE REFEREE: I will allow in my discretion one question.

Mr. Hiller, you are still under oath.

RE-DIRECT EXAMINATION BY MR. SANDLER:

Q Mr. Hiller, assuming all of the facts in your appraisal of January 17th, 1974 except the facts set forth on Page 10 which, Your Honor, refers to the three comparable leases - - assume Page 10 is out of this report and assume in lieu of the specific references in Page 10 to the three specific leases, and you base your report on comparable leases from your own knowledge of the comparable

leases in the area, do you have an opinion as to the leasehold value that Overmyer has in this particular warehouse?

MR. BRECKER: Objection.

THE REFEREE: Sustained. Without some testimony he has read comparable leases or knows about this lease.

MR. SANDLER: I will do it again as far as that is concerned.

Q Do you have any knowledge of comparable leases in the area?

A Yes.

Q What is that knowledge based on?

A My experience in working in the area as a real estate person.

THE REFEREE: Did you read the leases?

THE WITNESS: In some cases, yes.

THE REFEREE: Did you read this lease and the modification?

MR. SANDLER: The Overmyer lease?

THE REFEREE: That's right. I am asking you if you read that lease?

THE WITNESS: No.

THE REFEREE: In coming to a valuation of a leasehold don't you consider in a lease something more than the dollars? A man may have to give his wife to the landlord, his first daughter to the landlord and - -

THE WITNESS: Yes.

THE REFEREE: When you go to such lease do you generally go beyond the dollars per foot or do you look at the burden? Are you a lawyer?

THE WITNESS: Your Honor, what we would look at in the lease is not only the dollars but the relationship of the dollars being paid as to what the market is.

THE REFEREE: How about the rest of the lease?

THE WITNESS: If there were any special conditions set forth in the lease that were unusual - -

THE REFEREE: You would want to know?

THE WITNESS: We would want to know. But, they would not necessarily affect the value of the property.

THE REFEREE: Supposing a lease gave a thirty-five year term subject to something absurd like whether you like or don't like chocolate ice cream. Would it - - did you read the case at Bar, our particular lease?

THE WITNESS: No.

Q Are you familiar with the terms of the lease?

A Yes, I am.

Q Can I ask you to read that lease now

THE REFEREE: No, I am not going to do that at all. Give me a value, if you can, a simple value per square foot as it exists today on a thirty-five year lease understanding that none of us can peer into the future.

Can you give me such a value without anything more?

THE WITNESS: With a dollar amount ascribed to it, yes, sir.

THE REFEREE: What is a lease worth that rents eighty-eight or so thousand square feet, or whatever the footage is here,

over thirty-five years, remembering the subtenant has less than one year to go because in six months, I am told earlier in the testimony, it is prepared to leave.

THE WITNESS: On a thirty-five year lease a property of this type would rent at this date for approximately one dollar and seventy cents per square foot to something like two dollars and fifty cents a square foot gross.

THE REFEREE: That is not giving me the value of the leasehold.

MR. SANDLER: That's the beginning of arriving at it.

THE REFEREE: I think we are getting so far into the realm of nothing but guesswork on Mr. Hiller's part - - I don't think as a conscientious witness he would allow himself to be used to come up with a number out of thin air.

I think we add nothing to what already has been done. You are not getting this appraisal in.

MR. SANDLER: I am asking an expert

witness if he has an opinion if this leasehold has a value.

THE REFEREE: We are sure it has a value. He hasn't got it for me.

Did you ever go into the building?

THE WITNESS: Yes.

THE REFEREE: Could you appraise what was done in the building by that tenant as a gauge as to whether it might remain, might leave, might have to repair. Can you do any of that?

THE WITNESS: The sub-tenant?

THE REFEREE: Yes.

THE WITNESS: There would be some items that would undoubtedly remain that would be too expensive to remove, and the items that would probably be removed from the property if the tenant left would be the machinery and equipment that he is using in his manufacturing process.

THE REFEREE: Would it make it more or less likely that he would remain?

THE WITNESS: I would rather imagine he would remain.

THE REFEREE: On what kind of terms? Supposing the landlord were to double the rent?

THE WITNESS: In that case I would presume he would move.

THE REFEREE: What is it you want? Do you want the number; do you want him to pull it out of a hat? Give us a number.

THE WITNESS: I can't give a number without setting forth the conditions for it. That would be what the rental market is.

THE REFEREE: Today?

THE WITNESS: Today.

THE REFEREE: What is the value of the lease today with six months to go?

MR. BRECKER: Your Honor, I must object to Your Honor's question, if I may, be referring you, please - -

THE REFEREE: You may. The Court of Appeals has said you may.

MR. BRECKER: May I direct Your Honor to the prior testimony. The witness has stated he has not personally examined or

read a lease for - -

MR. SANDLER: He said he read some leases.

MR. BRECKER: Please.

THE REFEREE: On your cross examination? He said none the last year and a few over the last two years.

MR. BRECKER: Excuse me, the testimony is not being quoted correctly. He stated in adjacent counties over the last twenty-four months he has seen other leases. He guesses. Then, on cross examination he says, "I have not seen them, it's a guess."

You excluded it from the record.

THE REFEREE: What possible answer can he give? Make your question.

Q Based on the facts set forth in your written appraisal exclusive of Page 10 and, further, based on your knowledge for rentals of comparable warehouse space in the area have you arrived at a value for the Overmyer leasehold interest?

MR. BRECKER: Objection. The record indicates he has no knowledge of com-

parable warehouse space. Your Honor had already sustained my objection when the identical question was asked.

MR. SANDLER: He said he does have knowledge. There are different ways of acquiring knowledge.

THE REFEREE: The objection is sustained. I don't think Mr. Hiller can add anything to this. If the appraisal has fallen I have no way of gauging his mind's operation. I don't think he is desirous of giving you an answer at this time.

MR. SANDLER: This is a value to this leasehold. If an expert can't testify to it, nobody can.

THE REFEREE: Not on information he has gotten from outside, inadmissible information.

MR. SANDLER: We would like to move at this point to appoint a court appraiser to determine the value.

MR. HERZOG: And adjourn the trial.

THE REFEREE: I won't get to a decision in this. What would make Mr.

Reuben's appraisal give it any more legal evidentiary value? I don't know.

MR. BLUM: Because it's not done by either party.

THE REFEREE: That may be. Whether it has more evidentiary value is another question. I am not sure that Mr. Reuben, if he is properly briefed, will not overcome what Mr. Hiller lacked.

Nonetheless, there is going to be a strong element of conjecture in any appraisal going over a thirty-year period. We are agreed on that?

MR. SANDLER: Of course.

MR. BLUM: And, in every market survey of every industry.

THE REFEREE: Mr. Brecker, since I am going to be trying these for three or four more days would you have any objection to the Court having an independent appraiser - -

MR. BRECKER: No objection, Your Honor, but if there is anything implicit in that question other than the appointment

of an appraiser I would like to be heard and strenuously do object.

I have been through this road before, Your Honor, in the first trial that I participated in before this Court respecting Mr. George Siegler and there were similar problems with the testimony of the debtor's and receiver's appraiser.

When the debtor and receiver struggled with the problem that materialized they applied to the Court for a continuance to obtain further evidence. There was argument and I believe Your Honor denied the application.

Your Honor, I came to court today to try a case as did the receiver.

THE REFEREE: You have made your case.

MR. BRECKER: Let's finish the case and have the case decided.

THE REFEREE: The application is denied. Do you have any other witnesses?

MR. SANDLER: Yes, I do, Your Honor. Mr. Flanagan.

THE REFEREE: I have sworn you in the prior proceeding and you are still under oath for these proceedings.

S A M U E L H. F L A N A G A N, having been previously sworn by Honorable Roy Babitt, was examined and testified as follows:

MR. SANDLER: Incidentally, Your Honor, because I was a little shocked by the rulings that have been coming I didn't respond completely but what was stated just went into my consciousness. I think Mr. Brecker mis-stated something. We did not ask for a continuance.

THE REFEREE: I am not going to continue this trial, which the debtor is going to pay for, and have the appraiser testify. I just don't know what real probative value a guesstimate of something thirty-five years hence is going to have in these proceedings.

MR. SANDLER: Your Honor, my appraisal - -

THE REFEREE: Frankly, on the evidence I have heard this morning I don't even know why you bothered with any of this. I frankly don't know because, quite candidly, I had heard enough on the evidence this morning to indicate this has a substantial value to the estate without putting a dollar on it. I don't know what motivates you fellows.

How much do you think I need to exercise an equitable conscience? If I understand the testimony, if I let this debtor live with this he has got sixty thousand dollars more from this tenants than he is paying out to the landlord. You fellows, I mean, you just go by the old rule, let's sock it all in even if it burries us en route.

How much do you think you need? The evidence this morning was this property throws off five thousand dollars more a month.

MR. SANDLER: Seven thousand dollars, Your Honor.

THE REFEREE: Whatever, to this

gage payments and taxes?

A He collects fifteen thousand two hundred thirty dollars a month and pays out in rent and taxes seventy-nine hundred eighty-seven dollars a month.

Q Does that include insurance?

A No.

THE REFEREE: That's the two hundred dollars a month we stipulated to?

MR. SANDLER: One hundred fifty dollars a month.

MR. BRECKER: Any number.

THE REFEREE: It was stipulated for all these cases that the receiver discharged his duties and got coverage at one hundred fifty dollars a month.

MR. BRECKER: I so stipulate.

A It will be less than that on this building.

MR. SANDLER: Will you also stipulate to the testimony of Mr. Guy who testified in your previous case as to the average cost of maintenance, the routine maintenance, as being two cents a foot?

MR. BRECKER: If you will let Mr. Guy - - if it's applicable in this case.

THE REFEREE: We will call him.

MR. SANDLER: The only other item is overhead expenses.

THE REFEREE: You must hear this. We are looking for net figures, bottom line figures. At a trial it was discovered at this point the Court did not have evidence from anybody as to how much is allocated to the general overhead, the running of this warehouse or that warehouse, nor do we know whether in this property there is an in-house staff not found in Mr. Flanagan's figures.

Counsel agreed when we get the figures from his accountant or the receiver we will get the bottom line figure and the right of cross examination will be reserved.

MR. BRECKER: So as to reduce?

THE REFEREE: Yes.

MR. BRECKER: I will concede. I think the whole darn thing is irrelevant.

MR. SANDLER: I have no further

questions.

MR. BRECKER: I have to ask a question of this witness or Mr. Guy.

CROSS-EXAMINATION BY MR. BRECKER:

Q Mr. Flanagan, do you know what improvements, if any, have been made by Overmyer in the subject premises at their own expense?

A Not specifically, no.

Q Do you know whether any such improvements were made or are you unaware of any such improvements?

A I am aware that there were some modifications made to the building while under construction due to the tenants.

Q Was that prior to the leasing of the building from Florence Lazar to Overmyer?

A Yes.

Q When was the last check received by Overmyer or the receiver for rent on these premises?

A The receiver has not received a rent check from American Hospital Supply since the receiver has been in control of the operation.

Q And, Overmyer, when was the last check they received?

A My records do not indicate it.

RE-DIRECT EXAMINATION BY MR. SANDLER:

Q Have you spoken to a representative of the sub-tenant recently?

A Yes.

Q Based on that conversation do you have any knowledge as to why they have not paid the rent?

MR. BRECKER: Objection, hearsay.

THE REFEREE: I will allow it.

A Yes, I spoke with the in-house counsel for American Hospital Supply in Illinois, a Mr. Nigro. I spoke to him on several matters.

THE REFEREE: Why haven't they paid the rent?

MR. BRECKER: I will stipulate that the rent hasn't been paid because we made a claim against the sub-tenant.

MR. SANDLER: You have tried to collect that rent for yourself?

MR. BRECKER: Yes.

MR. SANDLER: You have prevented the receiver - -

THE REFEREE: Do you want Mr. Guy?

MR. SANDLER: Yes.

THE REFEREE: Mr. Guy, you have been previously sworn today and you are still under oath.

M U R R A Y G U Y, having been previously sworn by Honorable Roy Babitt, was examined and testified as follows:

DIRECT-EXAMINATION BY MR. SANDLER:

MR. SANDLER: Mr. Guy has already been qualified, Mr. Brecker.

MR. BRECKER: I will stipulate to his qualifications to testify as to what the approximate maintenance costs on the subject premises are.

Q What would be the approximate cost per square foot for routine maintenance on this building?

A My answer would be there is one difference in this building than in the other ninety-nine percent in the system in that this company has on their staff and in operation everyday their own maintenance people.

Q When you say "this company," do you mean the sub-tenant?

A Yes.

THE REFEREE: American Hospital Supply?

THE WITNESS: Yes.

A As such they maintain a foreman and a couple of yardmen. We have received very, very little call to do work on that building, probably close to half.

CROSS-EXAMINATION BY MR. BRECKER:

Q Mr. Guy, do you know whether Overmyer subsequent to its leasing the subject premises from the present owner made at its own cost any improvements on the premises?

A What is the date?

Q Subsequent to May of 1969?

A I do not know.

Q Do you know whether they have not made any improvements?

A I do not know the answer to the question.

Q Have you physically examined the premises?

MR. SANDLER: Can I ask what the relevance would be on whether Overmyer made improvements on a question of termination of a lease?

MR. BRECKER: My point is if the property now was to go back to the landlord and it is worth more for some reason that it originally was worth I want to know whether the increase in the value occurred by some out of pocket expenses of Overmyer, by some special addition by Overmyer or whether Overmyer made a good deal in the - -

MR. SANDLER: I will stipulate with you it would be worth more because he could collect the differential.

THE REFEREE: You don't know, do you?

THE WITNESS: No.

THE REFEREE: He doesn't know.

MR. BLUM: I would like to examine this witness.

THE REFEREE: You just don't know when to quit.

MR. BLUM: I want testimony elicited

if he is able to do it.

DIRECT-EXAMINATION BY MR. BLUM:

Q Mr. Guy, you are familiar with construction costs, are you not?

A Yes.

MR. BRECKER: Can I ask counsel be cautious not to lead the witness.

MR. BLUM: This is the nature of direct and cross.

THE REFEREE: He is an expert. I understand you can lead an expert. He is a construction engineer of long experience of this company and others.

My understanding is even on direct an expert opinion may be drawn out.

MR. BRECKER: I thought you were referring to Mr. Blum as an expert.

Q Mr. Guy, have you had any experience in the letting of construction contracts in the State of New Jersey in the past year in the construction of the type of warehouse before the Court in this case?

A Yes. We just completed the sale-lease-back of one in October.

THE REFEREE: Where?

THE WITNESS: Edison.

Q How far is Edison from this subject property?

THE REFEREE: I thought this was Edison.

A It's in the same township. This is Edison Number 24; I am talking about Edison Number 23.

Q The same town in the State of New Jersey?

A Yes.

Q How big was that property you constructed; how big was the improvement?

A The improvement was just short of one hundred twenty thousand feet.

THE REFEREE: It's fifty percent larger?

THE WITNESS: A third larger.

Q Was the construction of the same type as the subject property we are talking about in this case, a standard Overymyer-type warehouse?

A Yes.

THE REFEREE: Same size plot?

THE WITNESS: No. We have in this unit - - you have an A and B unit, forty thousand square feet each. Normally our buildings have A, B and C, so you have two-thirds of a typical building.

THE REFEREE: The same parcel otherwise, adjacent land, et cetera?

THE WITNESS: Edison 23 was built more on a railroad curve. The proximity to the railroad is almost the same.

THE REFEREE: Would you in your judgment say that the buildings are comparable, except for size, as far as utility, accessibility, and so on?

THE WITNESS: Very much so.

Q You said you completed Edison Number 23 in October, 1973?

A Yes.

Q Have you any figures that could help this Court determine what the square foot cost was to improve that Edison 23 property, the building?

A Yes, we have the entire building cost.

THE REFEREE: How much?

THE WITNESS: Let me add a couple of figures. I don't have the cost of land in the computation.

MR. BRECKER: Will it help if I stipulate it cost more to build today than the building would have cost?

MR. BLUM: It would help if you stipulated what the cost of the land is. It wouldn't help if you stipulate that.

A Let me tell you that our out of pocket costs were one million two hundred seventy thousand dollars.

Q That was based upon a one hundred twenty thousand square foot building?

THE REFEREE: Eighty.

A One hundred twenty thousand. I don't think that's a fair cost. I would like to know if something has been testified to.

Q Go ahead.

A That is that the contractor did go bankrupt, the contractor swore that he lost one hundred thousand dollars beyond the fixed price that we held him to, and I have to believe he did that.

In other words, he didn't use very good

judgment. I think you could add one hundred thousand dollars to this.

THE REFEREE: You said this was - -

MR. BLUM: He is discussing Edison Number 23 which is the one hundred twenty thousand square foot building.

THE REFEREE: Would it cost a half less to build Edison 24?

THE WITNESS: A third less.

THE REFEREE: A third less?

THE WITNESS: No, it might be a little higher; it might cost twenty-five percent less because of a little different construction.

THE REFEREE: It would cost around one million dollars, roughly?

THE WITNESS: It would be around one million dollars.

MR. BRECKER: So what? We bought a building in 1969, it's now 1974; or, we leased a building then.

Q You figure, then, that the subject property would cost today one million dollars to build exclusive of land?

A You are giving me all averages. This is an exact cost and agreement entered into eighteen months ago.

THE REFEREE: Tell me how much?

THE WITNESS: It's going to cost you less than thirteen cents.

Q A square foot?

A To replace this on the basis of escalation, on the basis of - -

Q Exclusive of land value?

A Exclusive of land values.

CROSS-EXAMINATION BY MR. BRECKER:

Q The new Edison building, not the one subject to the lawsuit, has it been leased by Overmyer?

A I don't believe we have that building.

Q I don't understand.

A I think it was perged.

MR. BLUM: We rejected that.

Q This sale and lease-back to Overmyer - - Overmyer has rejected that lease?

MR. BLUM: That's correct.

Q Isn't that building or leasehold that

you just rejected right across the street from Edison 24 which is part of this lawsuit?

A Yes.

Q Do you have any feelings about the advisability or marketability or the rentability of these two warehouses right across the street from each other?

MR. BLUM: Objection. He hasn't been qualified as an expert for merketing of rental space.

THE REFEREE: Overruled. I will see if he knows anything.

A I will give you an answer.

Q I figured you would.

A I was told if I put heat in the Edison 23 warehouse they could lease eighty thousand square feet effective November 1st.

Q Who is it that told you that?

A Don Carol.

Q Who is he?

A Overmyer's area manager, regional manager.

Q Are the roofs the same in these two buildings?

A No.

Q Is the height the same in these two buildings, the height of the roofs?

A You mean in average height? One is about twenty-eight and a half and the other is twenty-six and a half.

MR. BRECKER: Thank you, sir.

MR. SANDLER: Thank you.

THE REFEREE: Anything else?

MR. SANDLER: No, sir.

MR. BRECKER: Your Honor, I must make one short point in closing, and the point is this, if Your Honor pleases, that respecting this lease as well as other leases unless Your Honor finds that the alleged defaults or if the defaults have been proved by the landlords, the pre-Chapter XI defaults can be cured, and unless Your Honor finds that the alleged defaults by virtue of the filing of the arrangement proceeding can be cured and that in curing them Your Honor has the power to hold that the leases are in full force and effect, then unless you make such finding, Your Honor, there is no basis in

the world to continue any stays respecting the relationship of Overmyer to these buildings because since the debtor, I believe, has conceded that this isn't a situation where they need three months to find another premises but that they need these various valuable premises to rehabilitate themselves, unless Your Honor finds that these leases can, in fact, be held in fact to be enforceable and all these breaches be materialized, Your Honor must then permit us to take possession or proceed in the State Court.

THE REFEREE: You application is denied. I could almost dictate an opinion now and you could go up on an appeal now.

MR. BRECKER: On what application?

THE REFEREE: That I vacate the stay.

MR. BRECKER: No. This is in the nature of final argument.

THE REFEREE: Then, you wait until you read the decision. Are you going to listen to testimony on the bottom line figure?

MR. BRECKER: I'm sorry, Judge.

THE REFEREE: I mentioned earlier we are still absent a bottom line net-net figure of how much the building yields to Overmyer.

MR. BRECKER: I am not going to accept - -

THE REFEREE: We will take testimony from Mr. Herzog ultimately, as the receiver, or his accountant wherein we will be told for all of you in this courtroom how much of the overall operations of Overmyer is allocable to a particular property such as your client's, whether that premises had its own administrative overhead also which might reduce the figures which Mr. Flanagan gave. Obviously he is going dollar-in, dollar-out.

MR. BRECKER: The question is whether I will waive cross examination.

THE REFEREE: To that extent the Court is not satisfied that all of the proof is in.

MR. BRECKER: I don't understand that.

If the Court will be satisfied and make a ruling in due deliberations I will waive any of this overhead as a charge because I don't feel it's relevant. If you are going to take - - and I understand your problem - - months or weeks to reach a decision after the information does come in then I would like the right - -

THE REFEREE: I will take weeks.

MR. BRECKER: That's too bad. If the Court could make an earlier decision I would waive this and he would waive this.

THE REFEREE: How about a decision now from the bench?

MR. BRECKER: In all fairness to Your Honor - -

THE REFEREE: I have read all of the cases including Lane Foods. I read Judge Judd's decision four times. I find more of a direction in Judge Judd's; I don't necessarily agree.

Do you want to give me the luxury of reading your brief?

MR. BRECKER: Yes, sir.

THE REFEREE: Decision reserved in all these instances. Mr. Herzog, no matter how long the Court sits these people are to be paid monthly. I want an order of the Court without in any way injuring any rights that the sub-tenants are to make payments of the amount due promptly.

There is no reason for the sub-tenants to get a free ride or even put your people into litigation to collect. There is no reason why, Mr. Brecker, the arm of this Court cannot be put on the sub-tenants to at least collect the monies.

MR. BRECKER: Excuse me, Judge, to put it in a special escrow account but not in the receiver's general operating account.

THE REFEREE: Just a minute. If we are collecting from American and we owe you the month in which you collect, how are you prejudiced, and keep the remainder in an escrow account?

MR. BRECKER: Certainly, absolutely. I don't want him to pay twice.

THE REFEREE: I don't want you to use

monies that may be held by this Court where somebody was entitled to them from the very beginning. But, it seems to me tenants are getting a free ride, sub-tenants, and we are not benefiting.

What on earth is wrong with all of you people agreeing to a Court Order?

MR. HERZOG: I have no objection with regard to these leases being litigated.

THE REFEREE: They are all being litigated.

MR. HERZOG: Those are not all our leases, those are some of them.

THE REFEREE: Let's take Mr. Brecker's two clients. Is there any reason why?

MR. HERZOG: I agree to it. I will submit through my attorneys based upon the records of the proceedings had before you over these number of days and weeks an application that all tenants of Overmyer properties - - I will annex a schedule - - will be directed to forthwith pay over. As far as Mr. Brecker and others like him that may be in the court we will enter a separate

stipulation and order with the receiver as to his property and as to those ones they will be segregated, the surplus over the payment of his use and occupation.

THE REFEREE: And will not be utilized for anyone else or for the general assets of this estate in the event of a bankruptcy?

MR. HERZOG: Yes.

MR. GEWERTZ: For my clients I would like to enter into that, also.

MR. HERZOG: Is that agreeable with you?

MR. BRECKER: Definitely.

MR. HERZOG: I thought, in fairness, since the management fee in real estate is about five percent there are obviously going to be management charges in collecting and apportioning the rents.

I asked him if he thought or would inquire of his clients whether that could be part of the stipulation, that the receiver would be allowed to keep a five percent receiver's charge to cover postage.

THE REFEREE: How much do you collect?

MR. HERZOG: Fifteen thousand dollars.

THE REFEREE: Five percent is seven hundred fifty dollars.

MR. HERZOG: That's the standard charge that people get.

MR. SANDLER: That is without problems of collection.

MR. BRECKER: I will get the money. I don't want the money. We will put it in our trust account and we won't charge any management fee at all.

THE REFEREE: The application is refused.

MR. HERZOG: It's not in the form of an application.

THE REFEREE: It sounds improper to me, Mr. Herzog. This Court is laboring for every creditor, it's not here to bury landlords or bag them.

The application is refused.

MR. HERZOG: I was asking Mr. Brecker to explore it with his client.

THE REFEREE: Thank you, Mr. Brecker.

24-I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

In the Matter
of

D. H. OVERMYER CO., INC. (FLORIDA),

Debtor.

No. 73 B 1134

United States Court House
Foley Square, New York, N.Y.

March 4, 1974
8:30 o'clock a.m.

LANDLORDS MOTION FOR POSSESSION (JACKSONVILLE #3)
ZALKIN & COHEN

Before:

HON. ROY BABITT, Referee In Bankruptcy

BARRY W. RAYVID
Official Court Reporter
U.S. Courthouse (R. 230)
Foley Square, New York, N.Y. 10007

A P P E A R A N C E S :

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LEVY, LEVY & RUBACK, ESQS.
Attorneys for the Debtor
225 Broadway
New York, New York

BY: BERTRAM R. LIFLAND, ESQ., Of Cousnel

- - - - -

P R O C E E D I N G S

MR. TODER: This is Jacksonville #3, Your Honor. In that we would request - -

MR. SANDLER: We have an application here in Jacksonville #3.

THE REFEREE: Yes, what is it?

MR. SANDLER: Your Honor, this is an eighty thousand foot building which pre-

sently has a seventy thousand foot vacancy. A seventy thousand foot tenant was sought in January.

Because we had not completed our arrangements with the new property managers, which we have advised the Court we were negotiating and which are now being consummated, it was difficult to rent. We have now, as of one week ago, hired a new property manager as we are doing all around the country.

The agreements are starting to fall into place. Mr. Flanagan is in court and can advise you under oath or otherwise as of last night he spoke to the new property manager who has active negotiations under way and is sure he can fill the seventy thousand feet soon.

I think it would be very unfortunate and, perhaps, a distortion if the seventy thousand foot vacancy were to be treated as something that can't be remedied and turn within a period of a week a potentially profitable property into a losing property simply because there was a period in which

the disquieting and unsettling effect of the Chapter XI prevented us from getting it into full gear for the lease.

As far as the receiver is concerned, and I say this for the record, if our new property manager cannot lease this within the next several weeks we will surrender it without a trial. I say that for the record. Under those circumstances I would ask that it go over to the first available date in April.

THE REFEREE: No, I won't do that. What I will do is I want to finish all of these cases in March. So, my thought was by the 26th of March you would know whether you have a customer even if he is not in possession.

MR. TODER: Your Honor, we would strenuously oppose any adjournment here. I don't believe it should be granted. This property hasn't been vacant for the last two weeks, three weeks, six weeks or eight weeks, this property has been vacant since January 1st according to the answer to the interrogatory. As of December 31st, Bridgestone Tire moved out.

There is no question of there being no notice or knowledge because a copy went to the attorney and a copy to us. There has been no question about this. This has been scheduled for trial and has been, indeed, adjourned.

THE REFEREE: How come I wasn't told about all this?

MR. SANDLER: It wasn't adjourned. The receiver has invested money in keeping this property. We have to pay the landlord seven thousand dollars a month. We have paid him twenty-one thousand dollars.

That means we drop that twenty-one thousand dollars if we don't get a chance to rent it. There was a new property manager who was hired within the last week who had told us as of last Sunday night he has good productive negotiations under way. The landlord is getting his U & O.

THE REFEREE: I know.

MR. TODER: From the middle of January I have been in constsnt touch with the receiver and his attorney saying to them get rid of Jacksonville #3, it's vacant, and

it's gone unheeded for all this time.

The fact that they have continued to pay U & O is nothing other than the fact they determined they didn't want to give it back. There must be numerous correspondence on this matter.

THE REFEREE: Mr. Flanagan, what is the yield on that property when it is fully occupied?

MR. TODER: It was a losing property when fully occupied.

MR. FLANAGAN: Bridgestone Tire was a public account. They had seventy-two thousand or seventy-three thousand square feet of public space, and to give you the yield on the public I would have to go back and refer to the company's records.

THE REFEREE: What can you rent this property for, roughly, in your judgment?

MR. FLANAGAN: The seventy thousand feet - - the bottom line negotiations that we would accept on the premises would be seven thousand dollars or ten cents a square foot.

THE REFEREE: That breaks even with the landlord?

MR. FLANAGAN: There is also a ten thousand square foot property paying thirteen hundred dollars.

MR. TODER: This is a marginal property.

THE REFEREE: I am not sure that a twenty thousand dollar a year yield to the estate - -

MR. TODER: It's not twenty thousand dollars.

THE REFEREE: He said there's thirteen hundred dollars a month.

MR. TODER: They had two tenants, Bridgestone Tire which paid six thousand dollars a year and a company called Outdoor World Distributors which paid a total of twelve hundred dollars. That's a total of seventy-two hundred dollars.

They have to pay sixty-one hundred twenty dollars in rent and nine hundred dollars in taxes. That's seven thousand dollars not taking into account any of the other things we will get testimony on.

Even if Your Honor should sometime hold under an equitable theory that the windfall argument has some merit, which I suggest it doesn't, they don't have it under a fully rented premises.

THE REFEREE: I can't understand why you kept the property, Mr. Sandler, and invested that kind of money where at best you will break even?

MR. SANDLER: I can't answer that. We are confident within the next few weeks we will have a tenant.

THE REFEREE: But, if I rent the place fully - -

MR. SANDLER: You will have about fourteen thousand dollars or fifteen thousand dollars a year.

MR. TODER: These are their figures, I am not making these up.

MR. SANDLER: Those are former tenants.

THE REFEREE: Mr. Toder, I think I would be derelict if I did not give them a chance.

MR. TODER: They have had a chance.

THE REFEREE: Mr. Toder, you and I both know I have no intenetion of deciding these cases piecemeal. I have decided to have all the trials finished by March so I can write my decision.

It really doesn't make a difference if you are hurt in the beginning or the end of March.

MR. LIFLAND: May I be heard?

THE REFEREE: Let me finish.

MR. TODER: There comes a time when everybody has to fish or cut bait.

THE REFEREE: They are going to fish for three weeks.

MR. LIFLAND: Exactly.

MR. TODER: It's not a - -

THE REFEREE: Mr. Toder, if this were the last case I had to try, if this were the lst of the Overmyer disputes, and it was the only thing that kept me from taking all of the cases back to chambers and writing my opinion I would feel much more sensitive to your position.

Supposing one of us got sick today and

I did not come in, I would put this over. Who would quarrel with the fact I got sick?

I will try this by the end of March. I don't think you are being prejudiced provided you are being paid for March. Why they are investing seven thousand dollars a month since the case came to me when it's marginal I don't know. But, apparently they feel strong that they have a shot.

Why don't I give them a chance?

MR. TODER: Let me make one last statement and that is even taking at face value their hopes that they will be able to rent it for seven thousand dollars, not six thousand dollars - -

THE REFEREE: I don't understand it, either.

MR. TODER: It's marginal.

THE REFEREE: You are not prejudiced.

MR. LIFLAND: It seems to me Mr. Toder is getting more than he would under any other circumstances. If it can't be rented the receiver agrees to turn the property over forthwith.

THE REFEREE: And he gets the money for March.

MR. TODER: If we try it today we obviously get our U & O, anyway.

THE REFEREE: So, you are not being hurt.

MR. TODER: Our client wants to be done with Overmyer.

THE REFEREE: You can't be done even if I try this today and reserve decision, and on the 26th of March when I put these to rest Mr. Sandler asks me to reopen the record in this case because they now have a tenant that yields X dollars - - do you think I would not be remiss in my duty by not allowing them to do this?

MR. TODER: That would raise very nice questions, I would think.

THE REFEREE: If I give you back your property today I have an empty building.

MR. TODER: I am happy to have it.

THE REFEREE: At least, for one thing, at the price of an adjournment they are getting seven thousand dollars for March. Then

they may get their empty building back.

How are you really hurt? You have to be seven thousand dollars ahead of the game.

MR. TODER: We are hurt because as we see it - - I am looking at it from the standpoint of the figures of the receiver - - we should have had this property back months ago and we didn't and, therefore, we are hurt because my client - -

THE REFEREE: If your client was here now and I said to him I am giving you back an empty parcel that won't throw a penny off but, rather, if I try this case in March at least you get seven thousand dollars for March I don't know how your client could object to seven thousand dollars which he may not get if I give you the property this morning.

MR. TODER: Suffice to say, we are willing to take that risk.

THE REFEREE: In the exercise of my judgment I don't think I am prejudicing you.

MR. TODER: What date?

THE REFEREE: The last hearing date in

the month of March.

MR. SANDLER: March 26th.

THE REFEREE: Since I don't know what is going to be left over instead of starting at nine I think we should be starting at eight-thirty.

MR. TODER: May I suggest we be heard at the beginning of the calendar since we are being put over.

THE REFEREE: If you have nothing left.

MR. TODER: We will have nothing left.

THE REFEREE: In that case I am going to give you the courtesy of an eight-thirty date on Jacksonville #3. On that date, Mr. Sandler - -

MR. SANDLER: We are pretty open.

THE REFEREE: That's the last date I have given you for this case.

MR. SANDLER: However, the only thing we have on is the - -

THE REFEREE: You have Knight?

MR. SANDLER: Not for eight-thirty.

THE REFEREE: I am putting this on for eight-thirty because I have a calendar at ten o'clock. By the end of that date I will have disposed of all of the trials in the Overmyer cases. I don't think, Mr. Toder, that your client is being prejudiced because if I tried it today and reserved decision he is going to get the same seven thousand dollars.

MR. TODER: My point was only - - and I am not making it again - - that this property should have been given back a long time ago.

THE REFEREE: I can't, frankly, understand the judgment of the receiver.

MR. TODER: This is not one of their flagships.

THE REFEREE: I don't understand why the receiver socked twenty-one thousand dollars into what may be marginal. I think that may be a mistake.

MR. SANDLER: I am only humble trial counsel.

THE REFEREE: You are not humble, Mr. Sandler, whatever else you may be. Thank

you, gentlemen.

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(24 J)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

III

In the Matter
of

D. H. OVERMYER CO., INC.
(FLORIDA),

Debtor.

No. 73 B 1134

United States Court House
Foley Square, New York, N.Y.

March 26, 1974
9:00 o'clock a.m.

LANDLORD'S MOTION FOR POSSESSION
(JACKSONVILLE #3 - ZALKIN & COHEN)

Before:

HON. ROY BABITT,
Referee In Bankruptcy

BARRY W. RAYVID
Official Court Reporter
U.S. Courthouse (R. 230)
Foley Square, New York, N.Y. 10007

APPEARANCES:

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BOOTH, LIPTON & LIPTON, ESQS.
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BY: WILL B. SANDLER, ESQ., Of Counsel
-and-
MICHAEL KLEINERMAN, ESQ., Of Counsel

LEVY, LEVY & RUBACK, ESQS.
Attorneys for the Debtor
225 Broadway
New York, New York

BY: BERTRAM R. LIFLAND, ESQ., Of Counsel

- - - - -

PROCEEDINGS

THE REFEREE: We are on Jacksonville #3.

MR. TODER: Your Honor, on behalf of the plaintiff's case we request that plaintiff's request for admissions dated January

8th, 1974, together with the exhibits to the complaint; defendant's answer to the request for admissions; plaintiff's interrogatory dated January 8th, 1974; and defendant's answers to the interrogatories dated March 1st, 1974 be deemed marked in evidence.

THE REFEREE: Yes.

MR. TODER: In addition, Your Honor, the parties have stipulated that if the landlord were called and testified he would testify that there has been a default in the 1973 Duval County taxes which are delinquent as of April 30th, 1974. As of now that amount is ten thousand seven hundred sixty-eight dollars and forty cents owing, and I have a copy of the tax bill, Your Honor, which I ask be marked as Exhibit "1".

MR. SANDLER: The receiver has no objection to marking this tax bill as an exhibit and notes that the taxes are due April 30th, 1974.

MR. TODER: As I indicated.

THE REFEREE: What period do those taxes cover?

MR. SANDLER: 1973.

THE REFEREE: All of '73?

MR. TODER: Yes.

THE REFEREE: Is the receiver prepared to pay those taxes?

MR. SANDLER: The receiver has been escrowing the taxes commencing December 1st.

THE REFEREE: We are talking about one month out of that arrearage?

MR. SANDLER: That's right. I think it's safe to say that the receiver will not pay on April 30th, 1974 the other eleven months.

THE REFEREE: In other words, they are due?

MR. SANDLER: There will be due approximately nine thousand dollars.

THE REFEREE: They will not be paid by the administrators of this estate?

MR. SANDLER: Unless we are out of Chapter XI.

THE REFEREE: You may be out of Chapter XI by then.

MR. TODER: Let me indicate I am

informed that the bill has just been paid.

THE REFEREE: The bill has been paid by who?

MR. TODER: By the plaintiffs, and I will submit to the receiver the appropriate proof.

THE REFEREE: I don't think it's too important.

MR. TODER: So we can get back our money.

(At this time the said document was so marked as Applicant's Exhibit "A" in evidence.)

THE REFEREE: Why don't you give up the property and why don't you give up your claim?

MR. TODER: This is one where I thought we might be able to.

THE REFEREE: Are there vacancies?

MR. SANDLER: This is the one with a seventy thousand foot vacancy which we rented.

MR. TODER: I think we can prove with a full rental it's a marginal property. Agreed?

MR. SANDLER: Not agreed that you can

proceed to prove it.

MR. TODER: Your Honor, in addition, there were defaults in the payment of rents through the period of May through September 1973. That's five months at forty-three hundred eighty dollars each for a total, including interest, of twenty-two thousand three hundred dollars and thirty-two cents, which amount has been deposited in the Federal Court in Florida pursuant to a stipulation which is Exhibit "C" which is now in evidence and that money although in court has, needless to say, not been made available to the plaintiffs.

So, I think it's fair to say that that twenty-two thousand dollars is additional money which the plaintiffs are entitled to for rent past due which has not been paid.

THE REFEREE: Why was it deposited there?

MR. TODER: There is a litigation that was commenced and in the litigation there was a stipulation which, as I indicated, a copy of which is annexed as Exhibit "C" to the complaint - - pursuant to that the twenty-two

thousand dollars was deposited into court. It has not been made available as yet to the plaintiffs.

MR. SANDLER: If Your Honor please, I would like to comment on that stipulation and also correct some prior remarks made concerning taxes. In the prior case which was pending in the Florida court a stipulation was entered into in October 1973, some thirty days prior to the filing of the petition. Pursuant to that stipulation the debtor had to deposit immediately and forthwith twenty-two thousand dollars for rent, some eleven thousand dollars for taxes, and an additional six thousand dollars for the October rent. The total was forty thousand dollars.

The entire forty thousand dollars was paid in October. The only thing that is now unpaid from the debtor to this landlord is November's rent, and we are only talking about half of November because the petition was filed on November 16th. The rent is presently sixty-one hundred dollars, approximately, per month, so that the only thing that is un-

paid is about three thousand dollars pursuant to that stipulation.

MR. TODER: And the taxes.

THE REFEREE: The taxes have been deposited?

MR. TODER: It's different taxes. The taxes relating to this bill - -

MR. SANDLER: Let's look at the stipulation and then make the proper remarks for the record.

MR. TODER: Your Honor, the taxes that were paid into court were for the 1972 taxes which had been in default.

THE REFEREE: So, you are only out about twelve thousand dollars?

MR. TODER: No, Your Honor, we would submit we are out more than that. The money may have been deposited into court but suffice to say it's for rent due and we haven't got the money yet. If they are willing to enter into a stipulation with us whereby we can get that money - -

THE REFEREE: Why can't that be done?

MR. SANDLER: We are prepared to enter

into a stipulation to release any money paid into the Florida court - - we paid in about forty thousand dollars - - if it can be done consistent with the Bankruptcy Act.

We are also prepared to pay the one-half of the November rent which was supposed to be paid pursuant to the stipulation, which means there would be no default at this moment because the 1973 taxes are not due until April 30th.

It means we would have complied with every respect of this stipulation and we are willing to do that right now if the landlord will withdraw his application.

THE REFEREE: You may not have a termination here, Mr. Toder?

MR. TODER: We have a termination for a number of separate reasons. The fact there is a large amount of monies which are owing, as we suggest, twenty-two thousand dollars, plus the ten thousand dollars, plut the November rent merely goes to the arguments which have been raised by the defendant concerning equities of non-termination because of the

Bankruptcy Clause.

THE REFEREE: You may not find a forfeiture here if Judge Judd is right.

MR. TODER: I won't disagree. There is a legal issue to be resolved here. Even were all the defaults to be cured that will not wile away the legal issues.

Secondly, the stipulation provides, Your Honor, in the event that there should be a default in the payment of any rent subsequent to the entry of this stipulation there will be immediate surrender of possession of the subject premises, referring to Paragraph 4 of the stipulation.

This is an entirely separate and different argument over and above the question of whether or not a Bankruptcy Clause will operate regardless of the equity argument.

THE REFEREE: There is a separate contractual argument?

MR. TODER: Yes.

MR. SANDLER: Excuse me, Mr. Zimmerman, would you please sit down. We are not on your case now.

MR. ZIMMERMAN: Your Honor, if I might, as the representative and as the attorney for the creditors committee, just note parenthetically into the record that the payment into an escrow fund by the debtor within one month preceding the bankruptcy may well be a voidable preference under Section 60 of the Act and that the debtor or a trustee may want to take action against that fund in the event there is an adjudication.

Accordingly, I don't think it would be proper for the Court to direct that these monies be paid to the landlord.

THE REFEREE: Thank you. There is a separate contractual basis?

MR. TODER: That's right. Even were the payments fully made that would not obviate the problems.

THE REFEREE: Okay.

MR. TODER: Now, Your Honor, that completes the plaintiff's case.

THE REFEREE: The debtor answered; the admissions here are not the receiver's?

MR. LIFLAND: Yes, Your Honor, you are

right.

THE REFEREE: Okay.

S A M U E L H. F L A N A G A N, having been duly sworn by Honorable Roy Babitt, was examined and testified as follows:

THE REFEREE: Please give your full name and home address to the reporter.

THE WITNESS: Samuel H. Flanagan, 2 Chester Road, Darianne, Connecticut.

DIRECT EXAMINATION BY MR. SANDLER:

Q Mr. Flanagan, are you presently employed by the receiver?

A Yes.

Q In what capacity?

A In the area of rentals, collections and marketing.

Q Previous to your employment by the receiver were you employed in a similar capacity by the debtor?

A Yes.

Q How long were you employed by the debtor?

A A little over nine years.

Q Are you faimilar with the property known as Jacksonville #3?

A Yes.

Q How many square feet are in the Jacksonville #3 warehouse?

A Eighty thousand square feet.

Q Did there come a time in the last several months when seventy thousand of the eighty thousand feet became vacant?

A Yes.

Q Approximately when did that occur?

A It occurred - - it became vacant during the month of January.

Q Who was the previous tenant who had occupied that space?

A It was operated as a public warehouse and the sole customer in it was Bridgestone Tires.

Q After Bridgestone Tires vacated the seventy thousand feet was an effort made to secure a new tenant for that space?

A Yes.

Q Was a new tenant secured?

A Yes.

Q When was the lease with the new tenant executed?

A The lease with the new tenant was executed this past Saturday morning.

Q What is the name of the new tenant?

A Jacksonville Warehouse Company.

Q What rent does Jacksonville Warehouse Company pay for the space?

A Seventy-three hundred dollars and fifty-six cents per month.

Q How long is that lease for?

A It's a nine-month lease with a five-month option.

Q Mr. Flanagan, during the past several days did you have occasion to talk to a representative of the landlords concerning this lease?

A Yes.

Q Who did you speak to?

A I don't have his name with me.

Q Was it Mr. Powell? Can I refresh your recollection?

A Yes.

Q Can you relate to us the circumstances or the substance of the conversation as it relates to

the securing of this new tenant?

MR. TODER: Objection.

THE REFEREE: Is he going to testify what Mr. Powell told him?

MR. SANDLER: Powell is an agent of the landlord. If a conversation by an agent of the landlord constitutes any sort of admission against the landlord then it's an exception to the hearsay rule.

THE REFEREE: That's true if the agent is established.

MR. TODER: There has been no establishment.

THE REFEREE: If you will establish the relationship whereby I can bind an adversary to a party I will be happy to take it.

MR. SANDLER: Part of that was established by Mr. Powell's own statement that he in this matter represents and is acting for the landlord.

THE REFEREE: Who is Mr. Powell?

Q Mr. Flanagan, who is Mr. Powell?

A Mr. Powell is a real estate broker in Jacksonville, Florida.

Q Did Mr. Powell state to you - -

MR. TODER: Objection.

THE REFEREE: I didn't hear a question.

MR. TODER: Suffice to say the start of the question was sufficient to object to it.

THE REFEREE: Overruled.

Q Did Mr. Powell in a conversation you had with him in the last several days state to you he was acting as representative and agent of the landlord in connection with dealings with the Jacksonville Warehouse and the new tenant?

MR. TODER: Objection.

THE REFEREE: Overruled.

A Yes.

THE REFEREE: What did he say?

THE WITNESS: He had been retained by the landlord.

THE REFEREE: As a broker?

THE WITNESS: Yes.

THE REFEREE: Does an independent broker become an agent?

MR. SANDLER: Yes, sir. If a broker is retained by a landlord to go out and negotiate with a specific tenant that broker is the

agent of that landlord and an offer made by the agent or by the broker to a tenant, to a prospective tenant, as the agent of the landlord, and the significance is the offer was made at a time when the landlord didn't have the property - -

MR. TODER: Even assuming there was a statement or statements made by a Mr. Powell that in and of itself is - -

THE REFEREE: The objection is overruled. I would like to know on what basis you would know of this relationship besides from what Mr. Powell told you?

THE WITNESS: How I got to know Mr. Powell?

THE REFEREE: How do you know of this relationship apart from what he told you? Do you have any independent knowledge?

THE WITNESS: Yes. I talked with a representative of Jacksonville Warehouse - -

MR. SANDLER: That's the tenant - -

THE REFEREE: I am going to strike this testimony as to what Mr. Powell told him

about his relationship with the landlord. He is not subject to being cross-examined. I think it's a clear case of hearsay.

I am striking all the testimony relating to Mr. Powell. I want to know only about the renting of the premises.

Q Mr. Flanagan, did you have occasion to speak to the new tenant, Jacksonville Warehouse, with regard to their executing a lease for the seventy thousand feet not only with the receiver but, also, with the landlord?

MR. TODER: Objection, totally irrelevant to the issues here.

THE REFEREE: Overruled.

A Yes, I did.

Q Can you relate that conversation?

MR. TODER: Your Honor, what is the relevance of a conversation?

THE REFEREE: We will hear it. Overruled.

A That the property had been offered through Mr. Powell by Civic Parking.

MR. TODER: Your Honor, this is the subject matter of what Your Honor just ruled

should be stricken from the record.

THE REFEREE: Let me hear a little more. I can always strike it. There is no jury here.

A That Jacksonville Warehouse had agreed in the event that Civic Parking did have control of the property they would enter into a lease with Civic Parking and they were, on Thursday, concerned as to whether they should be signing a lease with the receiver until after this hearing this morning.

It's my understanding they signed a lease.

MR. TODER: Your Honor - -

MR. SANDLER: Can I hear the rest? You interrupted the witness in the middle of a sentence.

MR. TODER: My objection is what we are getting into here is nothing more or less than - -

THE REFEREE: I haven't heard anything yet that hurt you.

MR. TODER: I don't want to wait until something comes.

THE REFEREE: Overruled. The jury will

disregard that.

A It's my understanding a lease was signed Saturday with Jacksonville Warehouse by the receiver. But, also, Jacksonville Warehouse signed a lease with Civic Parking.

Q Do you know whether the lease that Jacksonville Warehouse signed with Civic Parking was for a lesser rent than the rental with the receiver.

MR. TODER: Objection.

THE REFEREE: Yes.

MR. TODER: If he has a lease let him show it to us.

THE REFEREE: I am going to strike all testimony as to what Civic Parking and Jacksonville did. The fact is we have a lease with Jacksonville Warehouse and the receiver?

THE WITNESS: Yes.

THE REFEREE: Strike all other testimony. What is the total rent roll in these premises, Mr. Flanagan?

THE WITNESS: The total rent roll is eighty-five hundred forty-eight dollars per month.

THE REFEREE: Fully occupied now with

these Jacksonville Warehouse people?

THE WITNESS: Yes.

THE REFEREE: Eighty-five hundred dollars a month?

THE WITNESS: Yes, sir.

THE REFEREE: That's about one hundred thousand dollars a year, or something like that?

THE WITNESS: Yes. The rent is sixty-one hundred twenty dollars; the tax escrow is nine hundred fifty-three dollars.

THE REFEREE: That's seven thousand dollars, give or take?

THE WITNESS: Yes. The spread is fifteen hundred dollars, roughly.

THE REFEREE: Roughly.

THE WITNESS: Roughly eighteen thousand dollars a year.

THE REFEREE: Subject, of course, to whatever testimony we develop on other charges to reduce that gross figure to a bottom of the line figure net?

THE WITNESS: Yes, sir.

MR. SANDLER: I would only note, Your

Honor, this is an eighty thousand foot warehouse.

THE REFEREE: Yes. Mr. Toder?

MR. TODER: Have you completed your examination?

MR. SANDLER: Yes.

CROSS-EXAMINATION BY MR. TODER:

Q Who was the rental agent whom you employed to go down and rent the premises?

A A gentleman by the name of Al Scheller.

Q Was he to be compensated for the work that was to be done?

A He is managing the properties in Florida for the receiver.

Q What is the amount of his compensation for the obtaining of this lease?

A It would be two percent, I believe.

Q Two percent of what?

THE REFEREE: The yearly total, I suppose, or monthly total.

A The gross.

Q What was the amount?

A The lease was seventy-three hundred dollars.

Q Seventy-three hundred fifty-six dollars?

A Seventy-three hundred dollars and fifty-six cents.

Q Do I understand, then, that if we multiply that times twelve we will get the yearly amount?

A It's a nine-month lease.

Q Would you please tell me how much money has been paid to this gentleman for the obtaining of this lease?

A Nothing.

Q Or how much you are committed to pay?

A We are not committed to pay anything until it's a fact.

Q So, the lease is not a fact yet?

A We are committed to pay only for the life of the lease.

Q Is the lease a fact as yet?

A They took occupancy on Monday.

THE REFEREE: So, this fellow gets about one hundred forty dollars a month?

THE WITNESS: Yes, sir.

THE REFEREE: On this lease for nine months?

THE WITNESS: Yes, sir.

THE REFEREE: About one hundred forty dollars a month is that two percent of the seven thousand dollar total?

THE WITNESS: I think that is correct.

Q Do you have a copy of the agreement that you signed with the gentleman who is renting the premises?

A No, I do not have a copy.

Q Do you pay any commissions or otherwise with regard to the obtaining of the other lease which is on the building?

A No.

MR. TODER: Is it your obligation to pay this two percent on the amount of the lease in advance of the full completion of the lease?

A No, it's a monthly obligation paid upon the collection of the rent.

Q Now, you have entered into a nine-month lease, is that correct?

A Yes.

Q That is not under your previous testimony the most favorable lease, is that correct?

MR. SANDLER: I object. I don't think

there was any such previous testimony.

THE REFEREE: I haven't heard any.

MR. TODER: I will lay a foundation, Your Honor.

Q Was it the policy of Overmyer to attempt to obtain three to five-year leases because those were deemed to be the most favorable?

A In the concept of merchandising warehouse space there can be guidelines laid down by each individual building and each individual situation has its own specific details which may or may not make a lease attractive.

Q So that circumstances could alter the fact of obtaining a three to five-year lease?

A Yes.

Q One of them might be your rushing to get a lease so you might prevent the reversion of the property back, is that correct?

A That certainly would not be - - it's certainly a motivation but certainly isn't the sole reason behind the Jacksonville lease in this instance. This happens to be a market with a rising lease rate. It probably should be worth more nine months from today.

Q At the end of the nine months you will have a vacancy unless you are able to obtain a tenant immediately, is that correct?

A Yes.

Q That's the reason why short-term leases are risky, is that correct?

A It depends on the city. This is a city where the market is expanding. It's not one that is over-built.

Q When did Bridgestone Tires leave?

A Mid-January.

Q When was this rented?

A The lease was signed last Saturday. There was a gap of time in which the receiver had no representative.

MR. SANDLER: If Your Honor please, this particular tenant - -

MR. TODER: I am not sure what this is.

MR. SANDLER: - - has asked Your Honor to approve the sub-lease because they have signed two leases.

MR. TODER: Is this part of direct?

THE REFEREE: I don't understand what

this is.

MR. SANDLER: This Jacksonville Warehouse which signed a lease with us on Saturday was very concerned - - and I am not testifying, Mr. Toder - - because of the allegations made by the landlord that the tenants should not sign with the receiver. Therefore, the attorney for the tenant, being a very cautious gentleman - -

THE REFEREE: I won't approve leases. That's left to the judgment of the receiver. And, I haven't heard any allegations about the landlord, anyway.

Q Do you have a copy of the lease that has been signed?

A With the receiver, yes.

Q Would you produce it, please?

A Yes.

MR. TODER: Your Honor, I ask that this be marked as Applicant's Exhibit "B" in evidence.

(At this time the said document was so marked in evidence.)

MR. TODER: Your Honor, I would call to

Your Honor's attention this lease is not effective and in point of fact we still have a vacancy on the property, and I would specifically note the asteriks at the top.

THE REFEREE: It's just subject to the approval of this Court?

MR. TODER: Your Honor has just gotten through stating - -

THE REFEREE: In that case I will approve it. The receiver is an officer of this Court.

MR. TODER: Suffice to say, that the deal contracts for - -

THE REFEREE: If I chose to leave him to exercise his judgment, fine. If these people absolutely insist that I put a seal of benediction on it I will be happy to sprinkle it with holy water and do so. Give me an order approving this lease.

Was the rental reserved by this Exhibit "B", Mr. Flanagan, in your understanding to be competitive with the market prices for rentals with similar properties in this portion of the country or that city?

THE WITNESS: Yes, sir.

THE REFEREE: From that standpoint, then, this is a favorable lease?

THE WITNESS: Yes, sir.

MR. SANDLER: Do you have any more questions, Mr. Toder?

MR. TODER: I will let you know.

Q How much rent was collected in January 1974 in connection with these premises?

A I don't have the collection records with me.

Q In point of fact was only twelve hundred forty-eight dollars the amount paid by the sole remaining tenant?

A Well, Bridgestone Tires was still occupying a portion of the building in January.

Q But, they did not pay rent for January, is that correct?

A My recollection is we have not been able to collect for the occupancy in the month of January.

Q In February the same would be true, is that not correct?

A Bridgestone was not an occupant.

Q So, the total amount received by the receiver was twelve hundred forty-eight dollars, is that correct?

A I can't state that as a positive fact.

Q The rent that would be due from the sole remaining tenants in February was the only rent that was collected, is that not correct?

A I believe that is correct.

Q That is true for March of this year, is it not?

A No. The present occupant took occupancy on Monday, so it would be roughly a fourth of the month's rent that would be applicable to March.

Q Has that been collected by the receiver?

A It's in a trust account of an attorney in Jacksonville dependent upon the determination.

Q What determination?

A As to which lease should be honored, I believe.

MR. TODER: I have no further questions of this witness.

MR. SANDLER: No further questions.

THE REFEREE: Thank you, Mr. Flanagan.

MURRAY GUY, having been duly sworn by Honorable Roy Babitt, was examined and testified as follows.

THE REFEREE: Please give your full name and home address to the reporter.

THE WITNESS: Murray J. Guy, 74 Briar Brae Road, Stamford, Connecticut.

MR. SANDLER: Counsel for the landlord has agreed to stipulate Mr. Guy's present employment and expert qualifications.

MR. TODER: Suffice to say, the testimony would be the same he has given on all of the other trials.

THE REFEREE: Two cents a foot overall?

MR. TODER: I just don't want to stipulate as to his expertise.

THE REFEREE: Do you know of any extreme conditions in those premises, Mr. Guy, Jacksonville #3 that requires care or repairs beyond your two cent a foot allocation which in this case is what, sixteen hundred dollars a year?

THE WITNESS: Yes, Your Honor, on

eighty thousand feet.

THE REFEREE: Do you know of anything really problematical with this property?

THE WITNESS: No. The repairs that were required such as door repairs and miscellaneous warehouse repairs have been contracted for on this building.

THE REFEREE: They have?

THE WITNESS: Yes, and the method of payment is in its final terms of being worked out to pay for miscellaneous repairs that would be covered under the two cents per foot.

THE REFEREE: Do you expect to budget the whole sixteen hundred dollars to this property or will it be more?

THE WITNESS: It will be more, probably two thousand dollars more. We have paving repairs, patching of the paving area, an so on, which we would take upon ourselves. The rest of the repairs either have been accomplished through other arrangements or have been assumed by the tenant, by some tenants, by taking the building as is or noting deficiencies.

THE REFEREE: Is that patching within the two thousand dollars you are talking about?

THE WITNESS: Yes, it would be.

THE REFEREE: Mr. Sandler, let's go.

DIRECT-EXAMINATION BY MR. SANDLER:

Q Were you testifying as to repairs within the two cent per foot budget?

A It would probably take, with the door repairs and the other work, about thirty-six hundred dollars.

THE REFEREE: We will need an extra two thousand dollars.

Q We are above the two cents, in other words?

A Yes.

Q Are there any other repairs required that would not fall within the routine maintenance budget of two cents per square foot?

A Not that I know of. We will establish that next week when I am in Jacksonville.

Q You plan to be there next week?

A Yes, to inspect Jacksonville 1, 2 and 3.

MR. SANDLER: No further questions.

CROSS-EXAMINATION BY MR. TODER:

Q When was the last time an inspection was made of these premises?

A The last time that any employee working for me inspected these was mid-October.

Q Who went down at that point?

A Gerald Paine.

Q Did he render a report to you?

A We discussed extensively his findings on Jacksonville 1 and 2 along with another report and briefly discussed the paving repairs on Jacksonville 3.

Q Did he inform you that fill would be needed because soil had sunk below the grade level with regard to a portion of the premises?

A Yes, that's in the drainage area.

Q Have you included that?

A That would be in the work we would do for the paving and it's within the two thousand dollars.

THE REFEREE: Within the thirty-six hundred dollars, the two thousand dollars above the sixteen hundred dollars.

THE WITNESS: Yes.

THE REFEREE: In other words, that place will cost about thirty-six hundred dollars to bring up to snuff?

THE WITNESS: Yes.

THE REFEREE: You have allocated sixteen hundred dollars at two cents a foot so it's an extra two thousand dollars and it's all within the thirty-six hundred dollars you are talking about?

THE WITNESS: Yes.

Q In connection with the recent rental of the seventy thousand square feet, what repairs have been made or are contemplated to be made to the interior of the building which is to be occupied?

A To my knowledge the majority will be concentrated on putting all the doors into operable condition which includes panel repairs, adjustment of springs, et cetera.

Q Has the tenant, the new tenant, requested that any additional repairs be made there in the premises he is to occupy?

A I don't have any firsthand knowledge of that.

Q Is one of the purposes of your visit next week to determine whether additional repairs have to be made to these premises?

A I have just taken it upon myself to make a complete inspection of this building as long as I have to inspect Jacksonville 1 and 2.

Q To your knowledge, then, has there been any complaints or requests by the new tenants for repairs or changes to be made by the structure which he is to occupy?

A I have no knowledge of that.

MR. TODER: I have no further questions of the witness, Your Honor.

MR. SANDLER: No further questions.

THE REFEREE: Mr. Guy, thank you.

MR. SANDLER: Your Honor, we have no further witnesses in connection with this property, and I would just note for the record that the balance of the term of the lease with renewal options is thirty-four years.

THE REFEREE: When will Mr. Herzog testify as to those other items?

MR. BOOTH: Put it down for the 18th of April.

THE REFEREE: All counsel will be advised?

MR. BOOTH: A letter has gone out.

THE REFEREE: Thank you, Mr. Toder.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

In the Matter
of

D. H. OVERMYER,

Debtor.

No. 73 B 1129

United States Court House
Foley Square, New York, N.Y.

January 15, 1974
2:00 o'clock a.m.

MOTION FOR POSSESSION (POKRASS - WACHTELL, LIPTON, ROSEN & KATZ)

Mana 2

Before:

HON. ROY BABITT, Referee In Bankruptcy

BARRY W. RAYVID
Official Court Reporter
U.S. Courthouse (R. 230)
Foley Square, New York, N.Y. 10007

APPEARANCES:

BOOTH, LIPTON & LIPTON, ESQS.
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292 Madison Avenue
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BY: MICHAEL KLEINERMAN, ESQ., Of Counsel

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BY: GARY BLUM, ESQ., Of Counsel

MR. DANIEL H. OVERMYER,
President of the Debtor

WACHTELL, LIPTON, ROSEN & KATZ, ESQS.
Attorneys for the Applicant
230 Park Avenue
New York, New York

BY: LEONARD ROSEN, ESQ., Of Counsel
-and-
THEODORE GEWERTZ, ESQ., Of Counsel

- - - - -

PROCEEDINGS

MR. ROSEN: This is the Pokrass matter, Your Honor.

THE REFEREE: Yes, it is, Samuel H. and Sylvia Pokrass. You are involving your-

self with which property?

MR. ROSEN: A property in Miami, Florida, Miami Number 2. This is Mr. Samuel Pokrass (indicating).

The brief we submitted in connection with the prior matter is also captioned for this matter.

THE REFEREE: That brief is captioned for three matters.

MR. ROSEN: Four matters. We intend to file a post-trial memorandum which picks up the defaults of the individual matters on trial.

THE REFEREE: We are dealing with two properties here?

MR. ROSEN: This is just one.

MR. BLUM: It's the guaranty of Ohio.

MR. GEWERTZ: Ohio is in the caption because it's the parent company.

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SAMUEL H. POKRASS, having been duly sworn by Honorable Roy Babitt, was examined and testified as follows:

THE REFEREE: Please give your full name and home address to the reporter.

THE WITNESS: Samuel H. Pokrass, 9102 Bell Bay Harbor Drive, Harbor Island, Florida.

THE REFEREE: We are dealing with Miami 2?

MR. ROSEN: Yes.

THE REFEREE: Go ahead, Mr. Rosen.

DIRECT-EXAMINATION BY MR. ROSEN:

Q Are you one of the plaintiffs in this proceeding?

A Yes, sir.

Q Who is the other plaintiff?

A My wife.

Q What is her name?

A Sylvia.

Q Are you and your wife the owners of certain premises located in Miami, Florida?

A Yes, sir.

Q What is the location of those premises

as best as you can describe it?

A 3400 and 3500 Northwest 110th Street.

Q When did you and your wife acquire those premises and from whom?

A In May, 1967.

Q From whom did you acquire them?

A From Overmyer.

Q Did you at that time enter into any transaction with Overmyer with respect to the premises?

A Yes, sir.

Q What kind of transaction?

A A lease contract.

Q I show you a document and ask you whether this is a copy of that lease that you entered into with Overmyer?

A Yes, sir.

MR. ROSEN: I would like to have this marked as Applicant's Exhibit "1".

MR. BLUM: I would like to ask a question. Was this lease document part of another document called a contract or purchase and sale by which you bought the property?

THE WITNESS: Was this what?

THE REFEREE: Was there another document that was executed at or about the same time of the purchase and sale of the contract?

THE WITNESS: There was a contract. It was a different contract for the purchase.

MR. BLUM: At the time you entered into that contract did you agree to give back this lease?

THE WITNESS: This lease I should give back - - no.

THE REFEREE: He is not asking you that, he is saying when you bought the property, was it also agreed you would then lease it back?

THE WITNESS: Yes, sir.

MR. BLUM: Have you got the contract here?

THE REFEREE: Do you have the contract?

THE WITNESS: You must have it (indicating Mr. Rosen).

MR. BLUM: Would you put the whole thing in because it's one document?

MR. ROSEN: No, I object to that.

THE REFEREE: As far as I am concerned I am dealing with a lease, not the underlying contract.

MR. BLUM: It is not the best evidence.

THE REFEREE: This is not the best evidence of a lease? - - Your objection is overruled. If you want to introduce the contract insofar as it bears on this instant dispute, by a landlord, put it in on your offer.

MR. BLUM: I am going to ask it be produced.

THE REFEREE: Your objection is overruled. I see utterly no reason why a contract for a sale of a property should be appended to a lease on a question of whether or not a landlord should be given his property for violation of the terms of the lease.

Your objection is overruled. If you want to introduce it, fine.

MR. ROSEN: I would like to correct myself. It is not a copy, it is an original which I would like marked as Applicant's Exhibit "1".

(At this time, the said document was so marked as Applicant's Exhibit "1" in evidence.)

Q At the time you entered into this lease with Overmyer, did you receive from Overmyer any other document relating to the lease?

A Yes, sir a conditional assignment of the lease.

Q I show you a document dated May 24, 1967 entitled "Conditional Assignment of Leases and Rentals," and ask you whether that is not the document?

A Yes, this is the document.

MR. ROSEN: I would like to have this marked as Applicant's Exhibit Number "2" and put into evidence.

MR. BLUM: No objection.

MR. KLEINERMAN: No objection. Let it speak for itself; the title does not describe the contents.

MR. ROSEN: It's not binding as to what it contains.

(At this time, the said document was so marked as Applicant's Exhibit "2" in evidence.)

Q After the filing of the petition in Chapter XI by Overmyer in November of 1973, did you

instruct your attorney to take any action with respect to this lease?

A Yes, sir.

Q I show you a letter dated December 12, 1973, written by the firm of Wachtell, Lipton, Rosen & Katz, addressed to D. H. Overmyer Company, Inc., and ask you whether the contents of that letter reflect your instructions to your attorney?

A Yes, sir.

MR. ROSEN: I have return receipts with respect to this letter from D. H. Overmyer from the Booth, Lipton & Lipton firm, and I will ask whether they will acknowledge the fact this letter was received?

MR. KLEINERMAN: Yes, we so acknowledge.

(At this time, the said document was so marked as Applicant's Exhibit "3" in evidence.)

MR. KLEINERMAN: The date of receipt being December 13, 1973.

MR. ROSEN: I think the receipts have the date of receipt and they can speak for themselves. They are attached to the letter which has been marked as an exhibit.

Q Prior to November 16, 1973, were all

of the rentals due under the lease paid?

A No, sir.

Q What was unpaid as of that date?

A October, November and this month's rent.

Q October, November and January, 1974?

A Yes.

Q October and November, 1973?

A Yes.

Q What is the amount of the rent that was due for October, 1973?

A Fifty-nine hundred sixty-eight dollars. I think it's under six thousand dollars.

Q Was the same amount due for November, 1973?

A Every month, the same thing.

Q Have you ever received payment of the October and November rents?

A No, sir.

Q During the course of this lease, was the rent paid on time?

A Never.

Q Did you give instructions to your attorneys from time to time to take any action with

respect to the unpaid rents?

A Yes, sir.

Q What attorneys?

A Mr. Spencer's office. It's a long firm name.

THE REFEREE: Is this a Florida firm?

THE WITNESS: Yes, sir.

Q Is Mr. Tom Spencer a member or associate of that firm?

A Yes, sir.

Q Did you at any time send any telegram to Overmyer with respect to non-payment?

A Yes, sir.

Q I show you a copy of a telegram dated March 13, 1968 and ask you whether that is a copy of a telegram that you sent to Overmyer?

A Yes, sir.

MR. ROSEN: I would like to have that marked.

MR. BLUM: Objection. 1968?

MR. ROSEN: That's right.

MR. BLUM: I object. It is not covered within the petition which is before Your Honor and the subject matter of this

hearing.

THE REFEREE: What is its relevance?

MR. ROSEN: The relevance in this particular case is there has been a history from the beginning.

THE REFEREE: It's conceded there were defaults on the eve of the petition; you are invoking the termination clause, I take it, on the basis of what I heard, on the filing of the petition?

MR. ROSEN: That is correct, Your Honor.

THE REFEREE: I don't know what it adds substitively. I will accept it. I doubt it has real, great, probative value.

Mr. Blum, I overrule your objection. I think it's rather neutral in its import.

MR. ROSEN: I would like to make a brief statement, that is, one of the things that the Overmyer companies are asking for is that the Court do equity for them and I think it's a very substantial equity.

THE REFEREE: You mean, how much equity they have done?

MR. ROSEN: Whether they are entitled to equity.

THE REFEREE: I don't - - well, I just wondered when the attorneys for the landlord were going to get around to what the nature of the application to the Court really is.

MR. ROSEN: There is a great deal of this and I think you will see it when I put Mr. Spencer on the stand. As far as Mr. Pokrass, I am satisfied to put this one in and forget the others - -

THE REFEREE: Mr. Pokrass, when, roughly, were you first due a payment by Overmyer under a lease?

THE WITNESS: The first payment was late.

THE REFEREE: It was?

THE WITNESS: The first payment was late.

THE REFEREE: How many times did you have to, in the period from the first payment, get ahold of an attorney or somebody?

THE WITNESS: At least four or five

dozen times.

THE REFEREE: Like every month?

THE WITNESS: I went to see Mr. Overmyer personally. I came down to New York especially to see him in '68. He assured me payments were going to be made on the 1st.

THE REFEREE: How much did you invest in this property?

THE WITNESS: Two hundred thousand dollars.

THE REFEREE: In cash?

THE WITNESS: In cash.

THE REFEREE: How big a mortgage?

THE WITNESS: Six hundred thousand dollars.

THE REFEREE: What was the purpose of your investment?

THE WITNESS: To have an income of twenty thousand dollars a year.

THE REFEREE: From this property?

THE WITNESS: Yes, sir.

THE REFEREE: So, it's like pulling teeth?

THE WITNESS: Like pulling teeth - -

worse than that.

THE REFEREE: Mark that.

(At this time, the said document was so marked as Applicant's exhibit "4" in evidence.)

Q Pursuant to the lease who was required to pay the real estate taxes?

MR. BLUM: Objection, it speaks for itself, Judge.

THE REFEREE: Let Mr. Pokrass speak. I enjoy listening to him.

A Mr. Overmyer.

MR. BLUM: That is not so. Mr. Overmyer is not before this Court. Can we get some straight answers here?

THE REFEREE: What do you mean by Mr. Overmyer? Not personally Mr. Overmyer?

THE WITNESS: The Overmyer Company.

THE REFEREE: How old are you, Mr. Pokrass?

THE WITNESS: I will be eighty-one next month.

Q Do you know if the taxes on this property, real estate taxes, are paid up to date?

A It was not paid.

Q What is outstanding?

A The 1973 taxes.

THE REFEREE: Do you have to pay them?

THE WITNESS: They are due in November.

THE REFEREE: They were due?

THE WITNESS: They are due in November.

THE REFEREE: This coming November or last November?

THE WITNESS: Last November.

THE REFEREE: What are you doing about it?

THE WITNESS: Well, the 1972 taxes I paid personally.

THE REFEREE: You paid?

THE WITNESS: With a penalty of around eighteen hundred dollars. The taxes were sold on the steps; 1972 taxes were sold on the steps of the City Hall, of the County Court House.

THE REFEREE: What does that mean?

MR. ROSEN: I believe he means, Your Honor - - and Mr. Spencer can tell us later - - in Florida there was a tax sale.

THE WITNESS: If the taxes are not

paid the county sells the taxes on the steps of the court house. Somebody bought the taxes. Finally, I received a letter from the first mortgagee, Prudential Life Insurance Company, that they watned a copy of the taxes to see whether the 1972 taxes were paid.

I called the county clerk and I was told that somebody bought the taxes. I went there and bought the taxes for seventeen thousand seven hundred seventy-six dollars, which was an eighteen hundred dollar penalty, and I told them to take the case over to Mr. Spencer.

Q Mr. Pokrass, I show you a document dated July 16, 1973 and ask you to identify that document?

A Yes, sir, that is that the taxes are paid.

Q Is that the receipt that you received when you paid the taxes?

A Yes, sir.

Q That's the original, is that correct, sir?

A Yes, sir.

MR. ROSEN: I would like to have this marked as an Applicant's exhibit and put in evidence.

MR. BLUM: What is the Seaboard Industrial Park, Section 1-A? That's what appears on this document.

THE WITNESS: That's the section of the Overmyer building.

MR. BLUM: No objection.

MR. KLEINERMAN: No objection.

(At this time, the said document was so marked as Applicant's Exhibit "5" in evidence.)

Q Did you subsequently receive payment of these taxes from the Overmyer Company?

A Yes, sir.

Q Under the lease was Overmyer required to furnish you with financial statements?

A Yes, sir.

Q Did you ever receive any financial statements from Overmyer?

A No, sir.

MR. BLUM: Objection, Your Honor, not within the purview of the proceeding.

THE REFEREE: Is that a ground, an

assignment under the lease for termination?

MR. ROSEN: That is a default. They are required to furnish a financial statement.

THE REFEREE: Default is a basis for termination under certain conditions?

MR. ROSEN: Which we are not asserting. We are simply proving - -

THE REFEREE: How many defaults do you need?

MR. ROSEN: They are asking for equity. I want to show they are not entitled to any equity at all. They repeatedly breached many provisions.

MR. BLUM: The document which has been marked in evidence, which is the notice of default dated December 12th from Wachtell, Lipton, Rosen & Katz doesn't even mention it. It's not a ground that they relied on, this default.

THE REFEREE: Mr. Rosen?

MR. ROSEN: I don't think I have to respond to that.

THE REFEREE: I will allow it.

Q Did you ever receive from Overmyer

copies of any sub-leases with respect to the premises?

A No, sir.

Q Did you ever request copies of any sub-leases?

A My attorney did.

THE REFEREE: Is that Mr. Spencer?

THE WITNESS: Yes, sir.

MR. BLUM: Objection to this; again, not within the framework of anything within this Court.

THE REFEREE: You don't think that everything is before the Court on what is essentially resistant by the debtor? - - This application is based on the exercise of the Court's equitable powers.

MR. BLUM: He is making us out to be very bad people.

THE REFEREE: Businessmen are never very bad people. Aren't you, in essence, at - - the defenses which you raise, aren't they addressed to the judgment of this Court, its equitable conscience?

MR. BLUM: Yes.

THE REFEREE: Why should I not, then,

hear the equities the other way? - - The equitable conscience of this Court starts on November 16, 1973. You can't undo nor can I what has happened pre-petition. There has been some evidence what took place before.

I think the jury is sophisticated enough to weigh it properly. Your objection is overruled.

Q Are you aware that any alterations were made to the premises by Overmyer?

A Yes, sir.

Q Were they substantial alterations?

A Yes, sir.

Q Describe them briefly.

A Yes, some more offices inside; and, they built a fence around a one-hundred-foot lot which separates my building to the one next door. They put a twelve-foot fence around there and leased it to some wire company. They did a couple of things on the west side of the building.

Q Did they ever ask for your approval of any plan of the alteration?

A No, sir.

Q When you purchased the premises, you

purchased subject to a mortgage?

A Yes, sir.

Q What was the amount of the mortgage at the time of purchase?

A Six hundred thousand dollars.

Q Have you been making payments of the principal and interest since then?

A Yes, sir.

Q When are the payments due?

A On the 1st.

THE REFEREE: The 1st of the month?

THE WITNESS: Yes, sir.

Q What did you anticipate you would use for money to make the payments?

A The income from the D. H. Overmyer building.

Q By virtue of the fact Overmyer makes late payments frequently, with respect to the rent - -

MR. BLUM: Objection, counsel is testifying for the witness.

THE REFEREE: He has already testified of a chronic situation with respect to lateness. Try not to use the exact words.

Q Did you from time to time have to borrow funds in order to make mortgage payments on these premises?

A Yes.

Q Did you in connection with the borrowings have to pay interest?

A Pay interest. And, they have a state tax.

THE REPEREE: Why did you have to borrow money?

THE WITNESS: In order to pay the sixty-three hundred dollars.

THE REFEREE: You mean, you were not getting the money from Overmyer?

THE WITNESS: I was not getting the income. Like on the tax bill, I had to go and borrow not only the tax bill but the payment I had to make; I had to go and borrow twenty-five thousand dollars to pay thirty-seven hundred fifty dollars in stamps on it. They have stamps in the State of Florida.

Q Under the lease was Overmyer required to furnish fire insurance and other insurance for the premises?

A Yes, sir.

Q I show you a document entitled "Certificate of Insurance," and ask you whether you received that document evidencing the fact that Overmyer furnished insurance?

A Yes, sir.

Q Would you tell us the amount of the insurance furnished and the period of coverage for it?

A The fire insurance amounted to eight hundred thousand dollars the first year, from June, 1969 to September, 1972.

MR. ROSEN: I would like to put this document into evidence.

MR. BLUM: No objection.

MR. KLEINERMAN: No objection.

(At this time, the said document was so marked as Applicant's Exhibit "6" in evidence.)

MR. BLUM: Did he say he got this insurance?

MR. ROSEN: He received that certificate indicating that Overmyer got it.

MR. BLUM: Okay.

Q Did you, thereafter, receive another

certificate with respect to your insurance coverage?

A Yes, sir.

Q Would you describe that certificate I just handed you?

A This certificate calls for fire insurance to the amount of two hundred fifty thousand dollars effective March 1st, 1972 and due up until September 1st, 1974.

Q Is that amount, two hundred fifty thousand dollars, in accordance with the lease provisions?

A No, sir, the lease provisions call for eight hundred thousand dollars.

Q You are saying to us whereas the initial certificate marked as Applicant's Exhibit "6" called for eight hundred thousand dollars and had a period running from June 1st, 1969 to September 1st, 1974, in March of 1972 you received notice that that was cancelled and they replaced it with a certificate that gave you two hundred fifty thousand dollars worth of coverage?

MR. BLUM: Objection. We have not seen a notice of cancellation. Counsel is again testifyin-

THE REFEREE: I think we should put that document in evidence and then I will allow you to ask Mr. Pokrass that question in a little simpler form.

Mr. Pokrass, while we are waiting for Mr. Overmyer to study the document which was just offered, do you have any idea how much the aggregate of the rents of the sub-tenants is in that building?

THE WITNESS: I have no idea.

THE REFEREE: Do you know who the sub-tenants are?

THE WITNESS: I don't know them. I saw a sign on the doors there - - one is a shoe company, one is a wire company.

THE REFEREE: How far from your home is this warehouse, this park, or whatever it is you said?

THE WITNESS: About fifteen miles.

THE REFEREE: Do you drive a car?

THE WITNESS: Not very often but I do.

THE REFEREE: Have you gone out over to the premises there?

THE WITNESS: I was there a few times.

THE REFEREE: Did you ever check who the sub-tenants were?

THE WITNESS: When I purchased the building there were two tenants there, Continental Can Company and Florida Paper Company. A few years later I passed by there again and stopped off and I found they are not there anymore.

THE REFEREE: Do you know who was there then?

THE WITNESS: I saw - - no. One time it was empty and then I passed by there again a couple of years ago or a year and a half ago, or so, and I saw the shoe company and the wire company at the D. H. Overmyer warehouse.

THE REFEREE: You don't know the names of these companies, or do you?

THE WITNESS: I know the name is Coastal Wire Company and Philco (phonetics), or something like that.

THE REFEREE: Do you have any idea how much rent these tenants pay?

THE WITNESS: No, sir, I have no idea.

THE REFEREE: No way of checking?

THE WITNESS: There is no way of checking.

THE REFEREE: Did you ever ask anybody?

THE WITNESS: I was there with the insurance man just a couple of weeks ago and there are Spanish people there and I couldn't talk with them and they didn't know anything.

THE REFEREE: How is the last document, Mr. Blum?

MR. ROSEN: I would like to mark that as Exhibit "7" and ask it be put in evidence.

(At this time, the said document was so marked as Applicant's Exhibit "7" in evidence.)

MR. ROSEN: I have no further questions of this witness.

THE REFEREE: Cross-examination?

MR. BLUM: Would you mind if I went first?

MR. KLEINERMAN: That's fine.

THE REFEREE: Let the record show this is Mr. Blum, attorney for the debtor.

CROSS-EXAMINATION BY MR. BLUM:

Q Mr. Pokrass, did you ever purchase any other building from the Overmyer operation?

A No, sir.

Q Were you ever interested in purchasing any building other than this building for yourself or for anyone else?

A Yes, sir, I was.

Q When was that?

A 1968 when I visited with Mr. Overmyer I told him I would be interested in purchasing another building if from now on he is going to make his payments on time. But, he never made them after that, either.

Q You visited him after you bought the Florida property?

A Yes, sir, I visited in 1968.

Q It wasn't 1971? By chance, would it have been?

A No, sir, I was never there in 1971.

Q Did you not see whether or not you could sell certain mid-West properties that the Overmyer organization owned to some of your friends?

A No, sir.

Q You didn't tell that to Mr. Overmyer?

A I wasn't here in '71.

Q I didn't say '71, I said did you tell Mr. Overmyer you might be interested in selling some of his properties or the companies' properties to some of your friends?

A I don't believe so.

Q Did you ever take any information with respect to any of the other properties that the Overmyer operation owned?

A Yes, sir, I took information about properties in Milwaukee, Wisconsin because I come from there.

Q When was that?

A 1968.

Q Were you going to buy that?

A Well, I- -

MR. ROSEN: Your Honor, I object to this line of questioning. It seems to me it's totally irrelevant.

MR. BLUM: It goes to credibility. He said he hasn't been paid and hasn't been from the beginning.

THE REFEREE: Show it quickly. The objection is overruled, Mr. Rosen.

Q Will you answer the question?

A What was the question.

Q Were you going to buy the property in Milwaukee for yourself?

A Yes, sir.

Q You weren't going to offer it to anyone else?

A No, sir.

Q Did you ever tell Mr. Overmyer you were going to sell some of his property or some of the companies' properties to friends or associates of yours?

A I don't believe - - No, I don't think so.

Q You don't think so?

A No, sir.

Q You don't recall any conversation like that in New York?

A Yes, sir.

THE REFEREE: Does this go to the question of breach?

MR. BLUM: It goes to credibility.

THE REFEREE: That he hasn't been paid his rent?

MR. BLUM: No, credibility on the fact he says he hasn't gotten his rent on day one, on time.

THE REFEREE: Let's assume I believe a man of eighty-one or if I don't believe him, I assume he is a little foggy.

Is there any alteration of the fact he didn't get the rent for the last two months before the petition or they seek to invoke the bankruptcy clause to terminate?

MR. BLUM: That's what their claim is.

THE WITNESS: Can I make a statement?

THE REFEREE: No, let your attorney make it.

Q Now, you have alleged in your complaint that there is a Florida, Dade County Circuit Court action against this debtor for the recovery of rentals, is that correct?

A Yes, sir.

Q Who is the attorney handling that case for you?

A Mr. Spencer.

Q Is he in Court?

A Yes, sir.

Q Has any money been paid into that court proceeding?

A What?

Q Has any money been paid into the court proceeding?

A Yes, sir.

Q There was paid at one time five months' rent, thirty-five thousand dollars.

THE REFEREE: When?

THE WITNESS: After the action was started the Court ordered it to be paid - - it wasn't paid - - to Sam Pokrass. It was paid to the registry of the Court.

MR. ROSEN: In the interest of doing this in an orderly fashion Mr. Spencer is going to testify concerning the litigation and Mr. Blum is free to ask him anything he wants.

We concede varying amounts of money were received by Mr. Pokrass through the litigation.

MR. BLUM: How much is there?

MR. ROSEN: Mr. Spencer will tell you that.

THE REFEREE: Is anyone going to concede there was two months' rent due or, at least, a month and a half?

MR. BLUM: I am sure the November rent wasn't paid.

THE REFEREE: And October?

MR. BLUM: I don't know.

THE REFEREE: You wouldn't know?

MR. KLEINERMAN: I don't know whether it was paid.

Q Now, you testified before that you expected to receive twenty thousand dollars a year on your investment of two hundred thousand dollars, is that correct?

A Yes, sir.

Q That is ten percent a year. What monies were you going to use to pay the mortgage?

A The rent I am getting from D. H. Overmyer Company.

Q That's the rent reserved in the lease, that's fifty-nine hundred sixty-nine dollars a month?

A Yes, sir.

Q So, the difference is what was to be used to service the mortgage, the difference between

the - - well, if you multiply fifty-nine hundred sixty-nine dollars a month times twleve months, you have about seventy-two thousand dollars a year rent?

A Yes, sir.

Q You said you were going to earn twenty thousand dollars on your two hundred thousand dollar investment. That leaves about a fifty thousand dollar difference, is that correct?

A Yes, sir.

Q What was the fifty thousand dollars to be used for?

A To pay the first mortgage of forty-three hundred two dollars a month to Prudential Life Insurance Company.

Q Now, you have testified there was substantial interior improvements when you were in the building?

A I was in the building a few months ago.

Q Had you ever been in the building before that?

A I was in - - inside, no.

Q Do you know when those improvements were made?

A No, I don't know.

Q Do you know whether they were made before you bought the building or after you bought the building?

A They were made after.

Q How do you know?

A I was there.

Q You said you were not there?

A When I purchased the building, I saw what was going on, I inspected the building.

Q What was inside?

A There was two occupants. One was Continental Can Company and the other was Florida Paper Company.

Q I am talking about what was inside from the point of view of improvements. You testified there were substantial improvements made; in fact, you said that you didn't even get a request from them to make those improvements, that they did it without asking you.

Is that what you testified to?

MR. ROSEN: I think the testimony speaks for itself. The word used was "alterations." His testimony was that

alterations were made without them obtaining his approval.

Q When were these alterations made?

A I wasn't there. I went down a couple of years ago and I saw a fence around there, a twelve-foot fence around the one hundred foot lot, segregating my building and next door, and I see a wire company there.

Q That was something that Mr. Overmyer's company was not supposed to do without your consent?

A Absolutely not.

Q Absolutely not?

A Absolutely not.

Q He had to have your written consent to do that?

MR. ROSEN: The lease speaks for itself; the lease provisions says if the alterations involve seventy-five thousand dollars or more - -

MR. BLUM: Exactly.

MR. ROSEN: Mr. Blum you don't have to play games. Mr. Pokrass didn't testify it was more than seventy-five thousand dollars or it was a less breach.

THE REFEREE: Let him go.

Q Mr. Pokrass, did you ever discuss this matter with Mr. Overmyer?

A No, sir.

Q Did you ever send him a letter to the affect he was in default of his lease for failure to ask your permission to put in these improvements?

A I think Mr. Spencer will answer that question.

Q I asked you whether you ever sent a letter?

A I never did.

Q Did you ever authorize your attorney to send a letter on this so-called default?

A Yes, sir.

Q Do you know if it was done?

A I don't know for sure.

Q Now, have you ever had an appraisal made on this property?

A No, sir.

Q Are you familiar with building values in the Miami area?

A No, sir.

Q When you purchased the property, were

you purchasing the property based upon the value of the building or as to the financial ability of the Overmyer operation to pay the rent?

A I bought the building on the financial ability of Mr. Overmyer and his two tenants, the Florida Paper Company and Continental Can Company.

Q Had you ever seen - -

MR. ROSEN: Your Honor, I would like to state an objection to the question. The documents, again, speak for themselves. Mr. Pokrass made a certain deal, got consideration. The transaction speaks for itself, Your Honor, what he received and what he gave.

MR. BLUM: I didn't ask that.

MR. ROSEN: I object to the question. I believe Mr. Blum was asking Mr. Pokrass to characterize his motivation at the time he went into the transaction.

THE REFEREE: Did you enter this to get some money, to have an income?

THE WITNESS: Yes, sir.

MR. BLUM: If Your Honor please, I asked him whether when he purchased the

property he was relying upon the value of the property's improvements or he was relying upon the financial ability of the Overmyer operation to at - - to make the payments because one of the issues raised on direct was the lack of financial statements to be supplied.

It is strictly a question which relates to direct and it is not having to do with what the contract said, what the lease said itself.

THE REFEREE: I am not going to tolerate much more. That goes beyond the issue of breach.

MR. BLUM: Your Honor, I objected to the direct line of testimony. You permitted it to go in.

THE REFEREE: Phrase your question different so he can understand it more simply. I will overrule Mr. Rosen's objection. If you want to practice, practice on Spencer.

MR. BLUM: I am trying to get to the root of the question.

THE REFEREE: The root of what question? To show he is a lawyer or there's been no breach?

MR. BLUM: To show his reputation is at stake in some of the answers he has given here. That's exactly what cross-examination is.

MR. ROSEN: Your Honor, I object to it.

THE REFEREE: So do I.

MR. BLUM: I asked whether or not - -

THE REFEREE: Ask it again.

Q When did you ask for financial statements from Mr. Overmyer's company?

A When did I ask?

Q Yes.

A A long time after I purchased the building.

Q Did you call him?

A My attorney did, I suppose.

THE REFEREE: Does Mr. Spencer know about all this course of events?

MR. ROSEN: Yes.

Q Did you ask Mr. Spencer to get the

financial statements?

A I asked Mr. Spencer, yes, sir.

Q To get the financial statements from the company?

A Yes, sir.

Q Do you know whether he did?

A I don't know - - no, he did not get them.

Q Do you know whether or not there is any money that was deposited for the months of October and November of 1973 in the Florida action?

A Whether it was deposited - - no, it was not deposited.

Q Did you have any discussion with anyone at Overmyer when you received your exhibit, Exhibit Number "7", which is this letter of March 13, 1972, which replaces a certificate of insurance?

Did you call anyone when you got this letter?

A When I received this letter I didn't pay no attention to that and I put it away among a whole docket of papers.

When I received a letter of cancellation of the fire insurance I immediately gotscared

and I called an insurance company in Miami and I got a different policy to cover myself to the tune of eight hundred thousand dollars.

Q Did you ever send a notice or have your attorney send a notice to Overmyer to get proper coverage for that building?

A No, sir, there wasn't enough time left.

THE REFEREE: Does breach occur under this lease when the guy realizes there is no insurance or when he does something about it?

MR. BLUM: When doing something about it. He has to notify them.

THE REFEREE: He has to notify Overmyer who should know how much insurance to put in that he didn't?

MR. ROSEN: The lease speaks for itself.

MR. BLUM: We will save the rest of our questions for the attorney.

MR. KLEINERMAN: I have some questions.

THE REFEREE: Quickly. I very much resent the idea that these landlords are not

to be believed because - - everybody, as I see it in this since - - in these two months - - that I havelived with this case, has been ripped off in this case; everybody has been ripped off, old and young alike.

Mr. Blum, for you to stand in this court and attack the credibility of an eighty-one-year-old man as to the matter of breach - -

MR. BLUM: Not as to breach, Your Honor.

THE REFEREE: Behave yourself. You represent the biggest rip-offs there are.

MR. BLUM: I apologize to the Court, but I represent a client.

THE REFEREE: There are bounds even for representations of clients which do not transcend. One of them is characterizing the question of breach, on documentary proof, that the witness is a liar because he wasn't getting ripped off three years earlier. It is enough.

If you don't like it, you can take your appeal. In the future you will conduct

the examination for the receiver, Mr. Kleinerman.

CROSS-EXAMINATION BY MR. KLEINERMAN:

Q Did you purchase this property from the Overmyer Company subject to a mortgage?

A Yes, sir.

Q Could you tell us what the interest rate on that mortgage was?

A Six percent.

THE REFEREE: That's a very good mortgage. Is it still a good mortgage?

THE WITNESS: Yes, sir.

Q What was the amount of the mortgage when you purchased the property?

A Close to six hundred thousand dollars.

Q When you purchased the property in addition to receiving the ten percent annual return, did you consider any tax benefits that you might obtain?

MR. ROSEN: I object to that question, Your Honor. I think it is irrelevant.

THE REFEREE: I do, too. I will let it go once around.

Did you anticipate a tax advantage, sir?

THE WITNESS: Yes, sir.

THE REFEREE: When you purchased this property, had you consulted with tax attorneys or your regular attorneys?

THE WITNESS: Yes, sir.

THE REFEREE: Could I ask you a question, Mr. Pokrass, and if it's too personal, you need not answer it and if anyone wants to object to it, they may and I will promptly withdraw it.

You say you invested two hundred thousand dollars, or so, in cash?

THE WITNESS: Yes, sir.

THE REFEREE: How much money did that leave you and Mrs. Pokrass in the bank? If you feel you shouldn't answer it, don't.

THE WITNESS: Not a hell of a lot.

THE REFEREE: If you feel you should not answer, don't.

THE WITNESS: As a matter of fact, I had to sell stocks that I had in order to pay the two hundred thousand dollars.

THE REFEREE: Did you have any other sources of income other than the property?

THE WITNESS: Yes, I had to other buildings.

THE REFEREE: Where were they?

THE WITNESS: An A&P store in Milwaukee and a Safe-Way store in Texas, a small store and they also pay their rent.

THE REFEREE: Did it throw off a living to you, those two stores?

THE WITNESS: Well, one does and one does not.

THE REFEREE: Go ahead. That's the Court's own voir dire. I don't anticipate cross-examination on that question.

Q Mr. Pokrass, did you, notwithstanding the late payments, deposit the checks when you received them?

A Yes, sir, the same day. I didn't wait until the next day.

Q At any time after you purchased the warehouse in Miami, did you ever offer to sell the building back to the Overmyer organization?

A Did I offer it?

Q Yes.

A I think in 1973.

Q In 1973?

A I was so disgusted with the whole thing, I tried to sell it back, my lawyer did.

MR. KLEINERMAN: I don't want to badger the witness if you are going to testify (indicating).

THE WITNESS: Mr. Spencer did.

Q Do you recall what you authorized your attorney to ask for in the way or purchase price for the property from the Overmyer organization?

A Unfortunately, I was quite sick this summer and was in the hospital and told my lawyer to do anything he wanted to do. I authorized him to do anything. I was so disgusted with the whole matter.

Q You did authorize him to offer the Overmyer people to buy back the building?

A Yes, sir. I am responsible for my lawyer's actions.

Q That's all I am driving at. If the rents were paid up that are in arrears, would you like to continue in your landlord-tenant relationship?

A Hell, no.

Q Would you tell me why?

A Because I can't be badgered anymore; I can't be bothered anymore. I got one heart attack on account of this. I am going to get surely a second one if I keep dealing with D. H. Overmyer.

Q Were you present in court yesterday?

A Yes, sir.

THE REFEREE: All day?

THE WITNESS: All afternoon.

Q When you were present did you hear a question similar to the one I just asked you?

A I didn't get it.

Q When you were present in court did you hear Mr. Sandler who represents the receiver ask a similar question to another witness?

A I didn't pay no attention.

Q Did you ever discuss the question I just asked you with your attorney?

A About my case, yes.

Q Did the question I asked you as to whether you would like to continue with Overmyer if they paid all their rental payments - - did you discuss the answer to that question with your attorneys?

A No, sir.

Q Never?

A Never.

Q So, it's your desire, then, to terminate your relationship with Overmyer, is that correct?

A By all means, yes.

Q Why?

A Because, as I said, because they are the biggest bunch of liars I have ever come in contact with in sixty years of building.

Q You also stated you had no idea of the amount of rentals paid by sub-tenants to Overmyer?

A No.

Q None whatsoever?

A I was never notified.

Q You would take this building back if they paid one dollar a year?

A If it was empty, I would take it back, yes.

Q If it were empty?

A Yes.

Q Did you deposit the checks that Overmyer sent you after you paid the 1972 taxes?

A Did I deposit the checks?

Q Yes.

A Sure.

Q Did they clear?

A Yes.

THE REFEREE: How much did you pay the attorneys, if I may ask, involving Overmyer in the last couple of years?

THE WITNESS: About fifty-five hundred dollars.

Q I just want to get back to one point. When you authorized your attorney to sell the building with Overmyer, you said do whatever you can to get rid of it?

A Yes.

Q I am going to ask your attorney the same question.

A Ask him instead of me.

Q You didn't tell him what price you wanted, you said do anything?

A As a matter of fact, my son is the one that handled it, talked with him about it. I was sick at that time.

Q Did you tell your son what price?

A I was in the hospital at that time.

Q I am sorry, I am not trying to disturb you, I am trying to get out an important fact, namely, what price it was that you wanted.

A I think we gave him a high figure in order he shouldn't buy it so he wouldn't get the building back.

Q I am asking what was the figure that you wanted Overmyer to pay you so that Overmyer would become the owner?

A I think it was a figure of one million one hundred thousand dollars.

Q That was an amount over the mortgage?

A No.

Q Including the mortgage?

A Including the mortgage.

Q The mortgage was how much when you bought the building?

A At that time six hundred thousand dollars. Now it's much less.

MR. KLEINERMAN: No further questions.

THE REFEREE: Thank you, sir.

MR. ROSEN: Thank you.

THOMAS R. SPENCER, JR., having been duly sworn by Honorable Roy Babitt, was examined and testified as follows:

THE REFEREE: Please give your full name and home address to the reporter.

THE WITNESS: Thomas R. Spencer, Jr. I am a partner in the law firm of Myers, Kaplan, Porter, Levinson & Kenin, 1428 Brickell Avenue, Miami, Florida.

My home address is 7820 Southwest 157th Terrace, Miami.

MR. ROSEN: If I may, I thought the easiest way to do this was to allow Mr. Spencer to state this in narrative form.

THE REFEREE: Let's move along.

DIRECT-EXAMINATION BY MR. ROSEN:

Q Mr. Spencer, have you represented the plaintiffs in this proceeding?

A Yes, sir.

Q Since what time in connection with these premises?

A Since approximately December 22nd, 1971 and prior to that time, of course, our firm

represented the Pokrasses. We handled the transaction involving the purchase sale lease-back.

Q Could you describe in narrative form the series of events relating to your representation of the Pokrasses insofar as any alleged breaches or defaults under the lease are concerned, or insofar as any itigation with respect to the lease is concerned?

A Well, the chronological sequence is Overmyer has been in default, that is, payments have been late since 1968.

MR. KLEINERMAN: Your Honor, can we object to the word "default"?

THE REFEREE: He corrected himself.

A (Continuing) I meant to say that the payments were late since 1968 consistently and I have the dates and times when the rental payments were made through 1971.

Q Are there any letters that were addressed to Overmyer that describe those so that we can put them into the record to avoid taking the time?

A I think probably, in summary, through 1971 I have a sequence of events. On December 22nd, 1961 by - - excuse me - - 1971 - - we sent by

certified mail a list to Overmyer of the late payments in rent.

MR. ROSEN: Could I have that marked as Applicant's Exhibit "8".

A On May 31st, 1972, I was instructed by Mr. Pokrass and his wife to institute suit in the Circuit Court in and for Dade County, Florida, against D. H. Overmyer Company an Ohio corporation.

THE REFEREE: Are you ready on that document?

MR. BLUM: We would like to object to this document.

THE REFEREE: Tell me why?

MR. BLUM: Number one, all it talks about here is additional rent and it's a tabulation of additional rent from January 9th, 1968 and it says nothing here about a default, nothing here about violations of the lease.

THE REFEREE: Do you think this lawyer was writing to get additional rent in addition to what was paid?

MR. BLUM: Yes.

THE REFEREE: Let me see the letter,

Mr. Rosen. Mr. Blum, your objection is overruled.

MR. BLUM: That's not a default.

THE REFEREE: It's merely evidence of a course of conduct.

MR. BLUM: It's not a breach.

THE REFEREE: I know.

MR. BLUM: Counsel uses the word "breach" consistently.

MR. ROSEN: I am happy to stand on what I said, Mr. Blum. It's not a breach, it's a question of whether a covenant of a lease was breached.

THE REFEREE: The objection is overruled, a copy of the letter will be received in evidence. I think it's probative on the question of the timely or late payments.

MR. ROSEN: Can we stipulate that the letters from Mr. - -

MR. BLUM: He sent us letters asking for monies, I will so stipulate to that. What it says in the letters, the letters so state. It may be for late payments.

The question is whether or not we have

the right to pay late and pay an interest charge, and that will be covered, in the briefs. It may not be a default.

That is the only thing I want the Court to recognize.

THE REFEREE: Of course.

(At this time, the said document was so marked as Applicant's Exhibit "8" in evidence.)

MR. ROSEN: Mr. Blum, we will save a lot of time - -

THE REFEREE: How many do you want to give me?

MR. ROSEN: There are five letters, Your Honor, in addition to the one that's already marked.

THE REFEREE: Is that a fair sampling?

MR. KLEINERMAN: For what it's worth, Your Honor.

THE REFEREE: Not very much maybe?

MR. KLEINERMAN: I don't know what you mean when you say "a fair sampling"?

Off the record.

(Discussion off the record.)

THE REFEREE: I will take a series of

letters as some evidence that there have been tardy payments over the years. I do wish, Mr. Spencer, you bring us a little more forward and closer to today.

I don't think anybody is going to dispute that you have represented this man and he has had this property. Let's get down to '72, '73, '71.

A On May 31st, 1972, a Circuit Court action was filed against D. H. Overmyer Company for termination and for eviction and possession of the premises. We attempted to affect - -

THE REFEREE: What was the ground asserted in the complaint or whatever it is they call the proceeding?

THE WITNESS: There were several grounds: (A) A failure to make timely payments in rentals on the first calendar day of each month; failure to pay six percent interest per annum; failure to make timely payments on real estate taxes and show evidence of payment in taxes.

At that point in time the property had been sold twice to different people.

MR. BLUM: The property?

THE WITNESS: The property.

MR. BLUM: Not a tax lien?

THE WITNESS: No, sir. The methodology by which the taxes are secured in Florida is that on June 1st after the property is in default a tax certificate is sold. If that tax certificate is held for two years and the taxes are unpaid, then the individual holding the tax certificate applies for a tax deed and it's issued and he becomes the simple title holder of the real property.

THE REFEREE: In that two years someone can redeem it?

THE WITNESS: Absolutely.

MR. BLUM: So, the property isn't sold.

THE REFEREE: I wondered what Mr. Pokrass was talking about. Apparently that is Florida.

THE WITNESS: Yes. And, failure to render financial statements pursuant to Section 26.

THE REFEREE: That was the gravament

of your complaint?

THE WITNESS: Yes, sir. We sought possession of the premises. Then we attempted to affectuate a settlement, through Mr. St. Angelo who was house counsel.

They made the interest payments, paid the court costs, the attorneys' fees, paid - - they also promised to make the payments on time. In September of '72, the payment was late; in October of '72 the payment was late by a substantial period of time, about thirty days. In November of 1972 the payment was again late; in December of '72 the payment was not made.

In January of '73 I spoke with Mr. St. Angelo that we were dismissing the first suit, taking a voluntary dismissal, and immediately instituting a second suit. In February of 1973 I instituted a second suit in the Circuit Court of Dade County requesting possession of the premises and termination of the lease pursuant to the failure to pay rent, failure to render financial statements, failure to pay taxes, and that suit was

instituted in March of 1973. Mr. Pokrass did not receive the rent.

On March 30th I wrote to Mr. Paul Stokes of the law firm of Smathers & Thompson asking that the premises be delivered up, telling him that we could not tolerate the situation at that time - - it was four months' in default; we hadn't received the payment in four months.

On March 30th, 1973, a copy of a letter was sent to Robert St. Angelo and also,to the D. H. Overmyer Company. On April 3rd, 1973, I received a letter from Edmund Connery, vice-president, secretary and general counsel of D. H. Overmyer, stating among a number of other things, that D. H. Overmyer Company, Inc. - - he was instructing his client not to make the payment.

I immediately instituted a proceeding before the Court in Dade County asking that the Court in-stander order D. H. Overmyer to pay the monies into the registry of the Court.

MR. ROSEN: Could we take a second.

MR. BLUM: I ask that Your Honor delete from this record the testimony of counsel indicating all of the defaults.

THE REFEREE: Don't use the word "defaults." We don't know if the non-payment is a default or something else.

MR. BLUM: He said it.

THE REFEREE: You should set a better example.

MR. BLUM: I think every one of these letters which have been the subject matter of a settlement as per counsel's statement - -

THE REFEREE: I thought this was a simple case but you chose, apparently, to attack credibility for purposes of showing equity. I think this is probably just as relevant.

I will allow it for whatever it's worth. I agree with you it's not worth very much.

MR. BLUM: It only makes a bigger record on less issues.

THE REFEREE: Isn't it my problem?

MR. BLUM: It will be mine on review.

THE REFEREE: You didn't lose yet.

MR. BLUM: I didn't say I am taking Judge, the review.

THE REFEREE: You didn't lose yet.

MR. KLEINERMAN: With respect to two of these letters - -

THE REFEREE: Why don't you withdraw the letters, Mr. Rosen?

MR. BLUM: Why don't you go to the November and December defaults because that's what the petition talks about.

THE REFEREE: Unless you are prepared to suggest, Mr. Rosen, that by making late payments, constitute a waiver of default why don't you forget about it?

MR. ROSEN: These are not being put in to show there is currently a default. The problem is there has been a pattern. If this debtor and receiver are conceding - -

THE REFEREE: Don't you think I have seen enough of it present in the fifty motions I have had in this case?

MR. ROSEN: I know, Your Honor.

THE REFEREE: What more do I need?

MR. ROSEN: Mr. Blum keeps referring to the District Court and Court of Appeals. If you are going to rule in our favor, I want to be sure that the record is there if we have to face the appeal.

THE REFEREE: I really don't think any of this is relevant. This whole thing on the plaintiffs' case could be wrapped up in five minutes, the whole thing, but we chose to get into this kind of a nonsensical chess game between eighty-one-year-old witnesses and forty-five-year-old lawyers.

I am going to sustain the objection. It is conceded on the record correspondence was had between Mr. Spencer's law firm and the Overmyer company?

MR. BLUM: Yes, sir.

THE REFEREE: In dealing with what appears to be a chronic tardiness under the lease?

MR. BLUM: Yes, without an admission it was a default.

THE REFEREE: Yes.

MR. ROSEN: That's fine, Your Honor.

We will withdraw the offer.

THE REFEREE: There is one letter that Mr. Spencer has referred to, that's the letter for Mr. Connery?

MR. BLUM: I would like to see that one myself.

THE REFEREE: While he is examining it continue with your chronology.

THE WITNESS: On May 1st, 1973 the Circuit Court in Dade County entered an order requiring Overmyer to pay into the registry in-stander the amount of five months' damages.

THE REFEREE: By "in-stander," you mean right away?

THE WITNESS: Right away. That payment was late. On June 7th, 1973 the Court allowed Mr. Pokrass without prejudice to his position to withdraw from the registry forty-two thousand forty-two dollars and two cents which was the aggregate up to date, which was done.

THE REFEREE: He is really not very badly hurt except the last couple of months at the time the petition was filed, right?

MR. ROSEN: In terms of money default that is correct.

THE REFEREE: His investment in time - -

MR. ROSEN: And counsel fees.

THE REFEREE: Were all your counsel fees paid by Mr. Overmyer's companies? I thought you said the Court awarded counsel fees?

THE WITNESS: No, sir, they reimbursed our firm one thousand dollars for the amount of money through June of 1972.

THE REFEREE: Your testimony ultimately is going to lead us to know there are really only two months in default?

THE WITNESS: At the present time.

THE REFEREE: Forgetting everything else, at the time the petition was filed Mr. Overmyer's company is only in arrears for October and fifteen days in November?

THE WITNESS: Plus, approximately the year and a half interest, the financial statements, the modification to the building.

THE REFEREE: Forget that. I am

talking about dollar losses?

THE WITNESS: In dollar losses it's October and November 1973.

THE REFEREE: And half of November?

THE WITNESS: That's right.

THE REFEREE: Because of the peculiarities of the bankruptcy law I have a point of departure.

THE WITNESS: Just to tie this up, on July 11th, 1973 a motion for contempt was filed before the Circuit Court and, also, one on the 26th day of October 1973, for failure of Overmyer to comply with the Court Order requiring the timely payment of rent.

THE REFEREE: When was that, in July?

THE WITNESS: In July and October. On November 13th a hearing was held and an order was entered orally in court requiring - -

THE REFEREE: By a judge of the court?

THE WITNESS: By Judge Turner of the Circuit Court requiring D. H. Overmyer to turn over the rent from the sub-lesees into the registry of the Court and for the registry

of the Court to pay the Pokrass'.

The order was not entered in written form until after the petition was filed. That's approximately a capsuled summary, and I have copies of the document and certified copies of the order of the litigation.

THE REFEREE: Has anyone looked at Mr. Connery's letter?

MR. BLUM: Do you want to see it?

THE REFEREE: I saw it.

MR. ROSEN: I ask it be marked as Applicant's Exhibit "9" in evidence.

(At this time the said document was so marked in evidence.)

MR. ROSEN: Judge, the only other document from the litigation is the last order entered after the commencement - -

THE REFEREE: What is that?

MR. BLUM: A contempt order signed after the filing of the Chapter XI and, therefore, is an annulity.

THE REFEREE: Mr. Blum, a Court's Order is never an annulity. What you are saying is that the entity has changed. Your

objection is overruled.

MR. BLUM: I believe, Your Honor - -

THE REFEREE: Do you think this Court Order is an annulity because they came to my court? They may be transformed from a debtor to a debtor in possession but they are only trans-mognified.

MR. BLUM: May I see the order? I object to the order. It's an order but not an order exemplified under the Federal Rules of civil procedure under the rules of evidence. I object to it as not being a proper document.

MR. ROSEN: Your Honor, it is a certified copy of the order. I think Mr. Blum is correct, it's not exemplified.

THE REFEREE: Must a decree of another Court be exemplified? I thought only with foreign judgments.

MR. BLUM: This is a foreign judgment.

THE REFEREE: Does the word "foreign" mean a State judgment?

MR. BLUM: If it's a Federal Court my understanding is it would not have to be

exemplified.

THE REFEREE: Would you rather have Mr. Spencer testify as to his knowledge of the entry?

MR. ROSEN: He has testified. If Mr. Blum so insists we will obtain an exemplified copy.

MR. BLUM: If Your Honor please, this order would seemingly require the debtor in possession to comply with its terms.

THE REFEREE: Of course it can't be paramount to me, but you didn't ask me in any way to rule on whether it has legal impact, you asked me to say it was an annulity, which it is not.

MR. BLUM: The legal impact should be noted on the records of the Court.

THE REFEREE: Could I see it, please?

MR. ROSEN: I would like Mr. Blum not to characterize his statement as being "the legal impact." The order speaks for itself as well as - -

MR. BLUM: And I am happy to - -

THE REFEREE: He denied the motion for

contempt and I suppose what Mr. Blum is saying is by the time the petition was filed this Court would have stayed execution of the order.

MR. BLUM: We had an order.

MR. ROSEN: Apparently that order was not served.

THE WITNESS: As I indicated, the hearing was approximately November 13th, 1973 at nine o'clock and the order was to be submitted that day.

THE REFEREE: The order is not an annulity. Maybe it was improvidently granted or improperly applied.

How does it help you if the contempt is denied?

MR. ROSEN: One of the positions we take, Your Honor, is in the interim time - - whether you grant or deny our motion - - you make sure the sub-rents are set aside. If it is determined that these other - -

THE REFEREE: I hope to have Mr. Herzog pay the rents during the life of the XI.

MR. ROSEN: Setting aside the sub-rents and paying the rents are two different things. He has paid the U&O. What this order would require is those rents be segregated.

One portion of this brief addresses ourself to this problem. I believe with respect to each property we are involved with, Your Honor, if Your Honor would direct the payment of all rents when the U&O - -

THE REFEREE: You want an order entered preserving the import of that order?

MR. ROSEN: Yes, Your Honor.

THE REFEREE: Are the sub-rents being collected by Mr. Herzog?

MR. BLUM: Yes, I would understand that to be so.

MR. ROSEN: We are not in direct contact with the sub-tenants and are not collecting anything.

THE REFEREE: Supposing I were to enter an order directing that the sub-tenants make their payments to the receiver?

MR. ROSEN: They are now doing it.

THE REFEREE: What is your problem?

MR. ROSEN: The problem is that the receiver should set aside those rents and not utilize them for other expenses in other properties.

THE REFEREE: I don't think that's necessary, Mr. Rosen, because the first day the receiver misses payment by as much as a dollar and/or does not pay everybody this case is dead and down the drain. I don't think you have got much cause for concern.

MR. ROSEN: I have the following cause.

THE REFEREE: What you are asking me to do, in essence, is have the receiver set up one hundred odd bank accounts. I mean, you know, there is enough paperwork in life. That is what he would have to do.

Why should I honor Mr. Pokrass' property and not everybody else under the sun? You want me to tell the receiver to keep the bookkeeper, make sure you know from whom you are collecting, segregate it - - unless I see that the system we employ is not working or somebody is not working be rest

assured I will take steps.

MR. ROSEN: Let me make a brief argument. The second portion of our brief is devoted to this question - - there is a conditional assignment of rents here under the lease. When it is in default under that conditional assignment Mr. Pokrass in entitled substintively under the law to collect rents.

Your Honor clearly has the power to over-ride and say the receiver collects the rents. But, your power to have the receiver collect it is a power you assert not to change Mr. Pokrass' rights subtintively because he has two months in default that nobody is protecting him against in this case. It's two months.

We have other clients who have other clients who have conditional assignments who may have six months' in default. The problem is when Your Honor turns it back to us, or whatever you do, we will get the property back with any exemptions generated during the period which may have been used to pay rent on Kansas City or Mr. Overmyer's

salary.

Under State laws those rents should have been set aside. I appreciate the fact this may create a difficult if not impossible problem for the receiver.

THE REFEREE: At the moment I am going to overrule your request. I will consider it again at the time the Court considers its decision.

MR. ROSEN: We would like to have this order entered.

MR. BLUM: No objection.

THE REFEREE: Mark that as Exhibit Number "10".

(At this time the said document was so marked as Applicant's Exhibit "10" in evidence.)

MR. BLUM: Your Honor, I would like a request of Mr. Rosen that since he has entered the letter he should offer the letter written by him because then it makes the answer - -

MR. ROSEN: We have a copy of it here.

(At this time Applicant's Exhibit "9" was changed to Applicant's Exhibit "9a" and the said referred

to letter was so introduced as Applicant's Exhibit "9b" in evidence and so marked.)

MR. ROSEN: No further questions.

THE REFEREE: You have briefed this question of conditional assignment?

MR. ROSEN: Yes, it's the second part. There is a Circuit case involving a mortgagee, not a landlord.

THE REFEREE: You said the reasons are - -

MR. ROSEN: There is law in New York and other jurisdictions that say when a lessee is in default there is a right recognized by the Bankruptcy Court, I believe, to let the landlord collect directly from the subtenants the rents.

THE REFEREE: How about Florida law?

MR. ROSEN: We have not looked for a case in Florida law but I think it goes back to English law.

THE REFEREE: Federal law?

MR. ROSEN: I think the federal cases recognize it and the citations go back to an equitable doctrine.

CROSS-EXAMINATION BY MR. KLEINERMAN:

Q Mr. Spencer, were you the attorney that your client was referring to who was authorized to make an offer to the Overmyer organization?

A Yes, sir.

Q Did you make an offer?

A Well, let me, if I might, give you the chronology.

Q I want to know if you made an offer?

A Yes, we made an offer.

Q When?

A Approximately May and June 1973. I might just add to that so you understand it the first indication of an offer was made through Overmyer through Paul Reisman (phonetics).

Q They offered?

A Called us up and asked us if we were interested in selling the property.

Q You called them back in April, May and June?

A Yes.

Q In other words, you were interested?

A Absolutely.

Q Do you recall the price you asked them

to pay?

A Yes.

Q What was the price you wanted from Overmyer?

A One million one hundred thousand dollars.

Q What was the balance of the mortgage outstanding, approximately, at that time?

A I think it was about six hundred thousand dollars.

Q That was the balance of the mortgage when he purchased the property?

A About four hundred twenty-five thousand dollars or something like that. I am really not sure.

Q Your client wasn't sure as to the amount he authorized you to offer. You made the offer. So, between the two of you there must have been some degree of certainty because if it were accepted in writing you would have been pinned to it?

A It never got that far.

Q I am asking whether you are sure or not sure of the amount of the offer?

A I am sure of the amount of the offer.

It was a gross amount including the mortgage. I am sorry but I don't know what the outstanding amount of the mortgage was at that time.

Q But, the total - -

A One million one hundred thousand dollars which is what we discussed and which was rejected.

Q This was going on while at the same time litigation was pending in the Florida court, is that correct?

A It was, in effect, an offer of settlement.

MR. ROSEN: I was going to object to it on that ground but I have no real objection. It was part of the litigation settlement.

A So I won't mislead you, it was soundly and firmly rejected out of hand.

Q It was rejected?

A Yes, sir.

Q By whom?

A Mr. Roisman through Mr. Hayes. I don't want to mislead you - - there are two separate occasions.

Q As I understand it, over a period of three months several offers were made?

A Paul Reisman called up and asked us if he could come down and discuss it. We told him we wanted one million one hundred thousand dollars.

He told us Mr. Hayes instructed him to tell us nothing in that range at all. Then Mr. Pokrass went to Milwaukee during the summer. I think it was August - - I am not sure - - and underwent surgery.

At that time Mr. Reisman called me back up and said they would take it for one million one hundred thousand dollars, would we give them a letter allowing them thirty days to close it because they had another purchaser for it. I gave them a letter, through instructions of Mr. Pokrass' son and then Paul Reisman called me up and told me they weren't going to exercise it, it was not a firm transaction.

Q I assume a copy of this letter exists in your files?

A Yes, sir.

Q Your files are up to date?

A Yes, sir. But, the transaction - -

Q What was the relief you were seeking in the Florida action?

A Termination.

Q Termination of the lease or possession because in hearing you you referred to these quickly on the record and I didn't hear the word "termination," I heard rental.

A Termination of the lease.

Q Do you have a copy of the pleadings in that?

A Certainly we have a copy.

Q May I see it?

A I think you will find it on the last page. We asked that the Court order eviction of the defendant and specific performance or mandatory injunction of the enforcement of the conditional assignment; that it award damages with interest for all the late payments and provide for all of the relief agreed to between the parties in the lease guaranteeing the conditional assignment.

Q Where is the word "termination"?

A The word "termination" is contained throughout the lease.

Q Where is it in the pleadings? Is the

document incorporated?

A We incorporated it.

Q I didn't see it attached?

A We attached it. You may not have a copy of it but it was attached as Plaintiff's Exhibit "1".

Q Is it your testimony that these pleadings sought termination of the lease notwithstanding the fact that the word "termination" can't be found in there?

A All I can tell you is that the complaint and amended complaint says what it says and I told you the relief we were seeking. We wanted Pokrass out and Overmyer out.

MR. KLEINERMAN: As I read the summons of notice and trial I don't see the word "termination" in that document. They refer to the Florida action which doesn't mention the word "termination."

I assume, then, this is an attempt to regain possession? Is my assumption correct or incorrect?

THE REFEREE: How could a lessor have gained possession except under a reversion? Would that not presuppose a termination

of the landlord-tenant relationship?

MR. KLEINERMAN: I would attempt to get the lease terminated.

THE REFEREE: Where do we go from here?

MR. KLEINERMAN: I want to know what they wanted.

THE REFEREE: What they wanted?

MR. KLEINERMAN: What they wanted.

MR. ROSEN: Our complaint is quite clear on the possession.

MR. KLEINERMAN: Possession?

THE REFEREE: Didn't they serve a notice of termination under the bankruptcy clause?

MR. KLEINERMAN: They seek possession, not termination.

THE REFEREE: Do you want to amend your complaint?

MR. ROSEN: If it's necessary.

THE REFEREE: This is the most technical thing. Do you mean when a man sues to terminate the relationship, to regain possession of the premises, that is insufficient

in law even in law in Florida to terminate the landlord-lessee relationship and in effect terminate the lease which is the basis on which the relationship exists?

How do you get possession from a landlord? How do you get it physically?

MR. KLEINERMAN: You ask the Court to declare the lease terminated.

THE REFEREE: That's what you would do because you are bright.

MR. KLEINERMAN: No, this is the only way.

THE REFEREE: I am going to ask you now, because I am going to go out and practice law one day and I want to know what to do, if I want to get possession back from a guy I leased it to how does one get possession from a lessee, by getting rid of the lessee?

MR. KLEINERMAN: Right.

THE REFEREE: Doesn't that presuppose that the relationship was terminated?

MR. KLEINERMAN: It presupposes that a Court finds that the relationship is termin-

able.

THE REFEREE: If a Court is asked to get rid of this guy, my lessee, and a Court should give the landlord possession would you not say that is not termination of the relationship?

MR. KLEINERMAN: I would say that is not termination of the relationship.

THE REFEREE: Do you want to amend your complaint?

MR. GEWERTZ: We don't have to.

MR. ROSEN: Our complaint says, in the first prayer for relief, that we have in our complaint in this proceeding - - I am reading a portion of it - - request the defendant among other things "to execute and deliver such agreements being instruments and other documents as may be necessary to terminate and discharge the lease of record."

It has always been my understanding, and I can be corrected, that a stay issued by the Bankruptcy Court does not prevent any person from exercising an acceleration right or termination right. It is quite

clear to me - - I may be wrong - - that your stay does not prevent someone from simply sending a letter accelerating or terminating and that person can then do anything with what it's done.

I believe the cases will support what I am saying. I don't think we need an order from Your Honor declaring a termination, we need a return of possession. As an excess of caution we did put in our prayer for relief a request that they execute such documents as may be necessary for a termination of record.

I will stand by that. If I am wrong I am wrong. The records speak for themselves. I am also happy to put in the complaint that has been referred to in as evidence.

MR. BLUM: I think Your Honor should be aware there is a decision by Bankruptcy Judge Rudin in the Queens Supermarket - -

THE REFEREE: Is that Judge Judd's case?

MR. BLUM: No. It's a case in which a notice of termination was stayed by the

Referee in Bankruptcy, a five-day notice to terminate the lease, and the Referee - -

THE REFEREE: Are you telling me that the Bankruptcy Court's Order supercedes a right of contract to be exercised?

MR. BLUM: I say it can stay it.

THE REFEREE: I respectfully disagree.

MR. BLUM: May I submit it?

THE REFEREE: No. It would be a sorry sham if these people could not ask for the very relief they are entitled to under their agreement because I have stayed something, especially in a proceeding before me.

MR. BLUM: That's using hindsight.

THE REFEREE: Please, if that's your straw - -

MR. BLUM: That's a decision I am going to supply the Court with.

THE REFEREE: What does it mean?

MR. BLUM: It means if a thirty-day notice is sent out and they are restrained and they shouldn't have sent it out and the thirty days goes by and then they use that as a condition precedent to say now give me

termination, then I say, Your Honor, it goes right to the crux of the case because if they never got the thirty days - -

THE REFEREE: Are you looking for this Court to exercise equity?

MR. BLUM: It's a decision.

THE REFEREE: Give me the decision and brief it.

MR. BLUM: It's a reported decision.

THE REFEREE: Where is it reported?

MR. BLUM: CCH, Judge.

THE REFEREE: I am prepared to disagree with my colleague.

MR. KLEINERMAN: Your Honor, I have no further questions of this witness. Frankly, I will respond to Mr. Rosen's legal argument vis a vis termination and possession. It will be briefed.

THE REFEREE: Off the record.

(Discussion off the record.)

(At this time a copy of the complaint was marked as Applicant's Exhibit "10a" and a copy of an amended complaint was marked as Applicant's Exhibit "10b". And, a copy of a letter to D. H. Overmyer from Thomas R. Spencer, dated

January 17th, 1973, was marked as Applicant's Exhibit Number "11" in evidence.)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

In the Matter
of

D. H. OVERMYER COMPANY, INC.
(FLORIDA),

Debtor.

No. 73 B 1134

United States Court House
Foley Square, New York, N.Y.

January 31, 1974
9:00 o'clock a.m.

LANDLORD'S MOTION FOR POSSESSION (MIAMI #3)
McMANUS & ERNST

Before:

HON. ROY BABITT,
Referee In Bankruptcy

BARRY W. RAYVID
Official Court Reporter
U.S. Courthouse (R. 230)
Foley Square, New York, N.Y. 10007

A P P E A R A N C E S :

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P R O C E E D I N G S

MR. SANDLER: It is hereby stipulated by and between the attorneys for the landlord, for the receiver and debtor, as follows:

(1) The debtor and the landlord entered into a lease on April 20th, 1967, for

warehouse premises located at Northeast 181st Street, Miami, Florida, known as and herein referred to as Miami Number 3.

At the time of the execution of the lease, the landlord purchased the warehouse and the underlying land from Overmyer and simultaneously leased it back to Overmyer. The purchase price paid by the landlord for the warehouse and underlying land was two hundred seventy-five thousand dollars in cash over an existing mortgage of approximately six hundred thousand dollars which provides for interest at six and a half percent per annum.

The balance of the initial term of the lease is now fourteen years and the lease contains four five-year renewal options, so that the unexpired term of the lease including renewal options is approximately thirty-four years.

(2) The lease provides for a base rent of sixty-seven hundred sixty-five dollars per month plus a monthly sum for taxes which currently is approximately fourteen hundred forty-

six dollars per month, making a total rent or base rent plus tax escrow of eighty-two hundred eleven dollars per month.

(3) The debtor in the spring of 1973, did not pay rent for the months of March and April, whereupon the landlord served upon the debtor the notice on April 11th, 1973, to pay the rent or deliver possession, the April 11th, 1973 notice acknowledged receipt of the January, 1973 rent.

(4) The landlord thereafter commenced an action in the Circuit Court of the 11th Judicial Circuit, Dade County, Florida against the debtor based on non-payment of March and April, 1973 rent. After this action was commenced the debtor paid the March and April, 1973 rent plus the tax escrow which was accepted by the landlord.

However, the action was continued and an order was made in said action appointing a receiver of the property, which order is dated November 13th, 1973, which order was entered by reason of the debtor's failure to appear at a deposition in Florida pursuant to

a prior order of the Florida court, dated October 16th, 1973.

MR. STAR: And to pay certain sums directed by said order.

MR. SANDLER: The parties stipulate that the state receiver never qualified or took possession of the property, or acted under the order by reason of the commencement of the proceedings by this court and the issuance of a stay order by this Court.

(5) That in a second action instituted by the landlord against the debtor in Florida a judgment was obtained by the landlord on November 15th, 1973, in the sum of fifty-six thousand dollars of which forty-nine thousand five hundred fifty-two dollars is for rent and taxes for the period May 1st to and including October 31st, sixteen hundred nine dollars and forty-seven cents is for interest, and five thousand dollars is for counsel fees. A copy of the judgment is being marked as one of the landlord's exhibits.

MR. LIFLAND: Being marked as Debtor's and Receiver's Exhibit is a document entitled

"Motion for entry of final judgment" which bears a stamp of November 19th, 1973, receipt, from the Clerk of the Court of Dade County. That's what it says, you take a look at it, and your man signed it.

MR. STAR: The final judgment and the motion referred to here in relate to an action bearing Case Number 73-25526 whereas the order appointing the receiver relates to an action which bears Case Number 73-12486.

MR. SANDLER: The number 6 the plaintiffs paid to the Jacksonville National Bank, the holder of the first mortgage, nine installments of fifty-nine hundred sixty-two dollars and nine cents each for interest and amortization payments, totalling fifty-three thousand six hundred fifty-eight dollars and eighty-one cents, plus an additional sum of thirty-seven hundred twenty-eight dollars and seventy-four cents for tax escrow.

MR. STAR: From May, 1973 through January, '74.

MR. SANDLER: The landlord concedes it has received from the receiver use and

occupancy rent for December, 1973 in the sum of sixty-seven hundred sixty-five dollars. The first mortgage covering the subject premises provides for interest at six and a half percent per annum and the plaintiffs paid the monthly required installments referred to above to avoid the acceleration of the maturity of the mortgage by the holder thereof.

(6) The attorneys further stipulate and agree that under the lease the debtor and now the receiver pay for rent and taxes approximately eighty-two hundred dollars per month and receive from the tenants, as of December 31st, 1973, approximately fourteen thousand three hundred sixty-six dollars leaving a differential of sixty-one hundred fifty dollars per month or approximately seventy-three thousand eight hundred dollars per annum.

Within the last several weeks one of the sub-tenants who paid twenty-three hundred dollars per month has vacated the premises so that as of this month the net differential between rents received and the rent paid is thirty-eight hundred fifty dollars per month

rather than sixty-one hundred fifty dollars per month. The parties agree that the vacancy which occurred within the last few weeks and which is referred to above involving approximately twenty thousand square feet and a rental of twenty-three hundred dollars per month, will be relet within the next several months at approximately the same rental and as to which the market area in Miami is favorable.

(7) The parties further stipulate that routine maintenance in connection with this warehouse would be approximately two cents a square foot per annum; that insurance being maintained by the receiver costs one hundred fifty dollars per month; and, that these proceedings will be left open for the purpose of receiving testimony from the receiver or his accountant as to the overhead and administration costs of the Overmyer operation attributable to this warehouse.

The attorney for the landlord will be advised when this testimony will be offered and will be given a copy of this transcript

and afforded an opportunity to cross-examine.

R O B E R T K A H N, having been duly sworn by Honorable Roy Babitt, was examined and testified as follows:

THE REFEREE: Please give your full name and home address to the reporter.

THE WITNESS: Robert Kahn, Whitney Drive, Greenwich, Connecticut.

DIRECT-EXAMINATION BY MR. STAR:

Q Mr. Kahn, what business are you engaged in?

A I am an insurance broker.

Q There has been a stipulation on the record, Mr. Kahn, that you advanced the sum of fifty-three thousand six hundred fifty-eight dollars and eighty-one cents to make payments to the holder of the mortgage covering the property known as Miami Number 3 in this proceeding, together with the sum of thirty-seven hundred twenty-eight dollars and seventy-four cents, for a total of fifty-seven thousand three hundred eighty-seven dollars and fifty-five cents to pay the installments due on the mortgage.

Now, during that period did you receive any rent from Mr. Overmyer with respect to Miami Number 3?

A No. The only money received was the payment from the receiver in December.

Q Now, in order to pay this sum of fifty-seven odd thousand dollars, will you tell us where you obtained those funds?

A I pledged some securities with the stockbroker I do business with and borrowed the money.

Q When you bought this property, when you and your wife purchased Miami Number 3, was this represented to you as a net-net deal?

A It was.

Q With a ten percent return?

A Correct.

Q You had no liability for any of the expenses, carrying charges, et cetera?

A That is true.

Q Now, can you tell us the status of the insurance policy affecting these premises? When does it expire?

A I received a notice that the police would terminate on February 4th, 1974, that there

would be no insurance on and after that date. Even that particular policy was written for an amount I considered inadequate, and I never received any satisfaction by way of a response from the Overmyer people when I objected to the fact there was only two hundred fifty thousand dollars fire insurance coverage on that building.

Q You have been in the insurance business for how long?

A Since 1934.

Q Are you familiar with the requirements of insurance on a building of the type referred to as Miami Number 3?

A I am.

Q Can you tell us what the type of insurance that would be required normally for proper coverage would be?

A The owner of the building should carry eighty percent of the replacement cost or insurable value of the building. Two hundred fifty thousand dollars would buy just a couple of bays of that building.

Q What is the area of that building?

A One hundred twenty thousand square feet

and the replacement value today of a new building would be in the vicinity of one million and a quarter dollars or one million and a half, or better.

Q Have you obtained an estimate as to the cost of obtaining insurance?

A I have.

Q How much is that?

A About four thousand dollars per year.

Q Now, when the debtor failed to pay the March and April rent as per the stipulation of fact that is on the record, did you engage legal counsel?

A I did.

Q Did legal counsel have difficulty in affecting service upon the debtor?

A They did.

MR. SANDLER: Objection.

THE REFEREE: You are leading the witness.

MR. SANDLER: Objection as to what a third party told him.

THE REFEREE: Do you know this of your own knowledge?

THE WITNESS: Not of my own knowledge, only what the attorney told me.

MR. SANDLER: Objection.

THE REFEREE: Sustained.

Q Did you receive letters from your attorney advising of his efforts to affect the claim and what he was doing?

A I did.

Q As the stipulation of fact indicates, the attorney was required to make a motion for the appointment of a receiver, is that correct?

A That is true.

MR. SANDLER: An objection as to what the attorney required to do. We stipulated that an application for a receiver was made and granted on default.

THE REFEREE: I will allow it.

MR. SANDLER: If you are going into what we stipulated - -

MR. STAR: This is just for the sake to show he incurred legal fees. I have to have some relationship that His Honor can see what was required to be done.

THE REFEREE: It was done. I'm satisfied that an attorney knowing what he was doing would take the necessary legal steps.

MR. STAR: That is sufficient, Your Honor.

CROSS-EXAMINATION BY MR. SANDLER:

Q Mr. Kahn, you testified, in dealing with insurance, that the replacement cost of this building would be one million and a quarter dollars or better?

A Probably.

Q What do you value the land at?

A I don't know; I don't know the value of land in that area. I am not an expert.

Q You did buy the property? Would you agree that it has some value?

A Well - -

MR. STAR: I object. It has nothing to do with this case.

MR. SANDLER: We are talking about hardship.

Q Would you say the land is worth at least one hundred fifty thousand dollars?

A I don't know; I don't know what land is worth.

Q Would you say it's worth one hundred thousand dollars?

A I don't know.

MR. STAR: I object.

Q Would you agree it has some value?

A I don't know if it is worth ten dollars or one million dollars.

Q Would you agree it has some value?

MR. STAR: We will stipulate it has some value.

Q You testified that the building has a replacement value of one million two hundred fifty thousand dollars or better and that the land has some value?

A Yes.

Q What did you pay for this land and - -

MR. STAR: Objection, it has nothing to do with the case.

THE REFEREE: Overruled.

Q Including the mortgage, about eight hundred seventy-five thousand dollars eight years ago.

Q Didn't you have negotiations with Mr. Overmyer in terms of selling back to Mr. Overmyer this land and building?

A We had some discussions about it but it

never came to any point.

Q In those discussions at what price were you going to sell it back?

MR. STAR: Objection to it, it never came to that.

THE REFEREE: You never formulated a figure and conveyed it to Mr. Overmyer?

Q Wasn't a contract drawn?

A He had drawn up a contract. I sent it back to him promptly.

Q Was that contract drawn based on conversations that were had with you and Mr. Hays of Mr. Overmyer's office?

A Positively not.

Q You know who Mr. Hays is?

A The gentleman sitting behind you (indicating).

Q You had no conversation with Mr. Hays in connection with re-selling the building for what you paid for it?

A I had - - I had no interest in selling. He might have called me and said are you interested in selling. The only answer I would have said was I had no interest in selling.

Q Is that true today? Do you have any interest in selling?

MR. STAR: Objection. This has nothing to do with the issues.

A At the right price, I might sell.

THE REFEREE: I think it has some bearing as to what the ultimate issue before the Court might be.

What was your answer?

THE WITNESS: I might be at the right price.

Q What would the right price be?

MR. STAR: Objection, again.

THE REFEREE: Have you formulated any judgment?

THE WITNESS: I haven't given it any thought.

THE REFEREE: You wouldn't sell it for less?

THE WITNESS: No.

Q Would you sell it for what you paid for it?

A The fact of the matter is I think he had somebody else call me and they asked me what price

I would be interested in. I said, "If you come up with a figure of about one million and a quarter or one million and a half, we might be interested."

THE REFEREE: What is wrong with that?

MR. SANDLER: Nothing as long as it's done not at the expense of every other creditor in this proceeding or at the expense of the debtor.

MR. STAR: I would - - Your Honor, he also advanced fifty-seven thousand dollars.

THE REFEREE: I think, frankly, you expect too much, Mr. Sandler. It's as though it's perjorative that a man in the witness box might be willing to make money if he can.

MR. SANDLER: It goes to a collateral question, the value of these properties unincumbered by a lease.

THE REFEREE: I know they have less value.

MR. STAR: We concede that the property without the present lease has value.

Q Do you concede that the property without the lease has greater value than the property with

the lease?

A Do I think the property is worth more with Overmyer out than with him in?

Q Yes.

A I think it would be worth more with him out. I don't think he knows how to run a warehouse.

Q If this lease were sold to a third party - -

MR. STAR: I would object to it as speculative.

Q (Continuing) - - would you be willing to accept this party as a third party - -

THE REFEREE: Supposing Overmyer were out of the box and assume some reputable third party were in?

THE WITNESS: No, I would not.

Q Could you tell me why not?

A I don't like the terms of th e lease now where somebody coming in - -

THE REFEREE: In other words, you would like to remake the whole deal?

THE WITNESS: At this point, yes.

MR. SANDLER: For the convenience of the Court, what the witness is referring to - -

THE REFEREE: I know.

MR. SANDLER: The lease presently has a base rent of about sixty-seven hundred dollars. In the first five-year period - - the renewal term - -

MR. STAR: Not sixty-seven hundred dollars.

THE WITNESS: Per month.

MR. SANDLER: Per month.

In the second five-year renewal period it goes to thirty-two hundred dollars, and in the third, it goes down to twenty-two hundred dollars.

THE REFEREE: I don't blame him for trying to get out. He is most candid, this witness. Let me ask you an honest question.

Supposing you could renegotiate a deal with Overmyer, a new lease much more favorable, would you enter into such an agreement?

THE WITNESS: If I got guarantees beyond him because I have no faith in him or his firm.

THE REFEREE: All right.

MR. SANDLER: No further questions.

CROSS-EXAMINATION BY MR. BLUM:

Q You indicated in your direct that you thought that the building should be insured for at least eighty percent of its market value, is that correct?

A Yes - - I didn't say market value, I said reconstruction cost less depreciation. If reconstruction cost would be one million two hundred fifty thousand dollars and you deduct ten percent, you would bring it down to one million one hundred thousand dollars and then - -

Q I believe your testimony was there was only two hundred fifty thousand dollars worth of insurance?

A That's right.

Q You never received any notice of an existing policy for an additional five hundred fifty thousand dollars worth of coverage at any time since you owned this property?

A I don't recall it.

Q Did you ever ask the Overmyer operation for an appraisal on the property for insurance purposes?

A I never did.

Q Well, I now invite your attention to the provision of Section 12.03 of the lease which talks about insurance and, the specific sentence, "Until an appraisal has been completed the parties agree that the full insurable value of the demised premises is the sum of eight hundred thousand dollars, and the tenant agrees to provide and continue insurance in such amount with a five thousand dollar deductible provision and a twelve thousand five hundred dollar deduction for wind and storm damage."

Now, my question to you is eighty percent of that would be about sixty-four thousand dollars?

A The amount of insurance specified is eight hundred thousand dollars which presupposes a larger amount. You are not reading it right.

Q You look at it.

A The full insurable value is the sum of eight hundred thousand dollars that's insurable.

THE REFEREE: Full insurable value?

THE WITNESS: Yes.

Q You indicated you have full coverage under your definition and have no co-insurance and no participation on behalf of the landlord on a loss

you would have to cover at least eighty percent of the full insurable value, is that not correct?

A Yes, you would have to cover eighty percent of the full insurable value. I don't know if it's used in the same terms in the lease.

Q When you gave the definition to indicate to the Court you didn't want to be a co-insurer you wanted at least eighty percent of the value?

A Of the full insurable value.

Q Is that less than eight hundred thousand dollars?

MR. STAR: He is arguing with the witness.

MR. BLUM: I am not arguing.

MR. START: This is 1967, also.

THE REFEREE: You are arguing with the witness.

Q If the lease provided that the full insurable value of the property was eight hundred thousand dollars how much insurance would you say had to be placed on that property to have a situation in which there would be no co-insurance on your part?

A May I answer it this way, and say if the insurable value was used in the same terms in

which it was commonly understood in the insurance business, sixty-four thousand dollars would be ample insurance.

Q Therefore, if the proof later shows that besides the two hundred fifty thousand dollar policy there was a five hundred thousand dollar policy - -

A Five hundred fifty thousand dollars additional?

Q Yes. Would you say there would be full insurance coverage?

A In compliance with this clause for 1967 but not today.

Q I asked you in this clause.

A In this clause, yes, in the context of this clause.

Q You also stated, as I understand it, that you never asked Overmyer to get an appraisal of the building for insurance purposes?

A No, I never did.

MR. BLUM: I have no further questions.

MR. STAR: That's all.

THE REFEREE: Thank you, sir. Does that finish your case?

MR. STAR: That's it.

MR. BLUM: I would like an opportunity to put Mr. Overmyer on the stand, Your Honor.

D A N I E L H. O V E R M Y E R, having been duly sworn by Honorable Roy Babitt, was examined and testified as follows:

THE REFEREE: Please give your full name and address to the reporter.

THE WITNESS: Daniel H. Overmyer, Hog Hill Road, Chappaqua, New York.

DIRECT-EXAMINATION BY MR. BLUM:

Q Mr. Overmyer, are you an officer of the debtor corporation?

A I am.

Q Are you familiar with the lease and the property known as Miami Number 3 in this proceeding?

A Yes.

Q I direct your attention to the provisions of the lease with respect to insurance, it's Article XII, and I first direct your attention to Subsection 12.02 and ask you to look at that, which

indicates generally that if requested, the tenant, which is the Overmyer operation, would obtain an appraisal for insurance purposes.

I ask you, did your company ever receive any notice from the landlord - -

MR. STAR: The witness testified he never asked.

Q (Continuing) - - from the landlord with respect to an appraisal of the property for additional insurance?

THE REFEREE: He stated he didn't.

MR. BLUM: I understand that. I want to bring out the existence of other policies.

THE REFEREE: What has that got to do with apparently having heard testimony favorable to you, namely, he never saw an appraisal? Aren't you burdening the record?

Did you ever get a request for an appraisal?

THE WITNESS: No.

THE REFEREE: That's two. Do you want someone else to make it three?

MR. BLUM: He says that the insurance

required it to be at current value.

THE REFEREE: The question to the other witness was did you ever get an appraisal made, and he said no.

Q Did the company maintain insurance coverage for this Miami Number 3 warehouse?

A Yes.

Q Can you tell us in what amount the face amount of the policy would be with respect to this property?

A A policy of two hundred fifty thousand dollars and a policy of five hundred fifty thousand dollars, totalling eight hundred thousand dollars written in separate policies.

Q Was that your understanding of the amount of insurance required to be carried on this property in accordance with the provisions of Section 12.03 of the lease?

MR. STAR: Objection to it. It calls for a legal conclusion.

THE REFEREE: I will allow him to testify.

A Our insurance department carried the full amount of insurance on each lease that we had

with the landlord.

Q Now, did there come a time within the past year when you had conversations with or negotiations with the landlord with respect to a possible re-purchase of the property?

A Mr. Kahn called me in the late winter or early spring of last year on the telephone and the conversation went this way - - he said, "You are behind in your rent," and I said, "Well, I am glad you called me." He said, "I believe you are going to go under." I said, "Well, Mr. Kahn, we certainly don't expect to; I wish you would come in and talk with me."

So, he came in shortly thereafter and he said, "You are becoming delinquent in your rent." I said, "Well, I realize that we are trying to get current." He said, "Are you going to go under?" I said, "No, I don't believe we are; I think - -" I said, "Maybe the best approach, inasmuch as you have an investment in this property is if we reach an accord to buy it back from you." He said, "Great."

I said, "I will pay you exactly what you got in the property," and he smiled and said, "Great," shook my hand, said, "We got a deal," and he

left, and those were his words almost ver batim.

Q What transpired thereafter?

A It was also discussed that I would send him a contract which we subsequently did. I know he had further discussions with Mr. Hays and we had further meetings in which he re-affirmed that he had agreed to this with me, but subsequently he changed his mind because he found the value of the building was substantially greater than what he originally paid for it.

MR. BLUM: No further questions.

CROSS-EXAMINATION BY MR. STAR:

Q Did you say this offer was made over the telephone?

A No, it was made in my office. He called me on the phone prior to that.

MR. STAR: I don't think it's important, but if Your Honor wants Mr. Kahn - -

THE REFEREE: It's a waste of time, all of this.

MR. STAR: That's all.

MR. BLUM: That's all.

THE REFEREE: Thank you, Mr. Overmyer.

MR. SANDLER: I call George Hays.

THE REFEREE: You are getting into things which I don't think have great bearing.

MR. SANDLER: It goes to credibility. The witness denies - -

THE REFEREE: What should I not believe?

MR. SANDLER: It's a matter of somebody saying something we can rebut.

THE REFEREE: What don't you want me to believe? Supposing he lies on the question of the negotiations, what is it you would like me to say?

MR. SANDLER: I would like to underscore that for you.

THE REFEREE: What is it you would like me not to believe about this witness?

MR. BLUM: Maybe his entire testimony is at stake if you don't believe him. The cases are very clear that a judge who doesn't believe one part of a witness' testimony - -

THE REFEREE: What part should I not believe that has a hearing here?

MR. SANDLER: His hardship or - -

THE REFEREE: You don't think it's a hardship when a guy winds up fifty thousand

dollars, sixty thousand dollars or one hundred thousand dollars in the hole?

MR. SANDLER: Not when he's negotiated to be paid back.

THE REFEREE: The only hardship is Overmyer.

G E O R G E H A Y S, having been duly sworn by Honorable Roy Babitt, was examined and testified as follows:

THE REFEREE: Please give your full name and home address to the reporter.

THE WITNESS: George Hays, 34 Daffodil Road, Stamford, Connecticut.

DIRECT-EXAMINATION BY MR. SANDLER:

Q Mr. Hays, were you previously employed by the debtor?

A Yes, sir.

Q In what capacity?

A Most recently as executive vice-president.

Q Did you hear the testimony of Mr. Kahn today?

A Yes.

Q Did you ever have occasion to speak with Mr. Kahn about re-purchasing from Mr. Kahn on behalf of the Overmyer organization Miami Number 3?

A Yes, I had one, I believe, in person and two or three subsequent telephone conversations.

Q Will you tell us about the first conversation in person?

A I was called by Mr. Overmyer's office which, I believe, was Mr. Overmyer's second meeting.

MR. STAR: I object to any conversations with Mr. Overmyer.

THE REFEREE: Why? He is here?

MR. BLUM: He is a party.

MR. STAR: His testimony with Mr. Overmyer isn't binding upon us.

THE REFEREE: Well, it's not hearsay.

MR. STAR: It's not binding upon us.

THE REFEREE: Overruled.

A I went into his office which, I believe, was on the occasion of his second meeting with Mr. Kahn. Mr. Kahn was in the office. I had previously under Mr. Overmyer's instructions, sent Mr. Kahn a proposed contract to purchase his property at what he

paid for it and Mr. Kahn told me yes, he had agreed to that, but he changed his mind and now he knows what the property is worth and is not willing to make that deal.

He alluded to increased tax liabilities by virtue of maximum depreciation benefits and he made some reference either at that meeting or later - - because he either just came back from Florida or was just going there - - and he used an expression that he thought warehouses like that were selling for twelve dollars a foot. He never quoted me a new sales price.

MR. SANDLER: No further questions.

MR. STAR: No questions.

MR. SANDLER: Your Honor, that concludes this case.

THE REFEREE: You will submit your briefs and memos of law and post-trial memos, if any.

(At this time, the following exhibits were so marked:

(At this time, a copy of the lease was marked as Applicant's Exhibit "1" in evidence; the order appointing a receiver was marked as Applicant's Exhibit "2" in evidence

and a copy of the final judgment was marked as Applicant's Exhibit "3" in evidence; two letters to D. H. Overmyer, dated April 11th, 1973 were marked as Applicant's Exhibits "4A" and "4B" in evidence; a letter from McManus & Ernst to D. H. Overmyer with proof of service was so marked as Applicant's Exhibit "5" in evidence; a copy of an answer and counterclaim in the Florida action, Case Number 73-12486 was so marked as Applicant's Exhibit "6" in evidence; and, marked as Debtor's Exhibit "A" was a copy of the motion for entry of final judgment in Florida action, 73-25526.)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

In the Matter
of

D. H. OVERMYER COMPANY, INC.
(FLORIDA),

Debtor.

No. 73 B 1134

United States Court House
Foley Square, New York, N.Y.

January 31, 1974
11:00 o'clock a.m.

LANDLORD'S MOTION FOR POSSESSION (MIAMI #7)
HAHN, HESSEN, MARGOLIS & RYAN

Before:

HON. ROY BABITT,
Referee In Bankruptcy

BARRY W. RAYVID
Official Court Reporter
U.S. Courthouse (R. 230)
Foley Square, New York, N.Y. 10007

A P P E A R A N C E S :

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- - - - -

PROCEEDINGS

THE REFEREE: What are we doing here?

MR. ZIMMERMAN: We probably could get this trial over in fifteen or twenty minutes.

THE REFEREE: Maybe you will concede to some of the facts as everybody else has conceded?

MR. BLUM: As I understand it, we are not going to finish the case because Mr. Guy is out of town.

MR. SANDLER: Mr. Zimmerman agreed because Mr. Guy has to be leaving for Texas on an emergency problem - -

THE REFEREE: When will he be back?

MR. SANDLER: At the next calendar date.

THE REFEREE: Since Mr. Zimmerman's client owns the calendar on February 12th, why don't we just adjourn Fanaberia?

MR. BLUM: It's a different case.

MR. SANDLER: It's the same client.

THE REFEREE: I don't know why these people are the least of all cooperative people. For the sake of it, put in your case.

MR. ZIMMERMAN: Your Honor, for the case, all I want to put in is the request for admissions which, I think, makes my whole prima facie case.

THE REFEREE: Yes.

MR. BLUM: The debtor and receiver have admitted all but Paragraphs 8 and 10 which are probably conclusions of law, anyway, so we rest.

MR. SANDLER: I call Mr. Flanagan.

S A M U E L H. F L A N A G A N, having been duly sworn by Honorable Roy Babitt, was examined and testified as follows:

THE REFEREE: Please give your full name and home address to the reporter.

THE WITNESS: Samuel H. Flanagan, 2 Chester Road, Darien, Connecticut.

DIRECT-EXAMINATION BY MR. SANDLER:

Q Mr. Flanagan, are you presently employed by the receiver?

A Yes.

Q In what capacity?

A In the area of marketing, sales, and collection of rents.

Q Did you previously occupy a similar position with the debtor?

A Yes.

Q For how many years were you employed by the debtor?

A A little over nine.

Q Does the receiver and prior to that, the debtor, keep records in the ordinary course of business indicating how much money is collected from sub-tenants on the various warehouses?

A Yes.

Q Do you have such records in connection with Miami Number 7?

A Yes.

Q Do these records also indicate what is paid to the landlords on the lease and/or taxes and rent?

A Yes.

Q Would you tell us what those records indicate with respect to Miami Number 7?

A That the monthly rentals due the landlord is eleven thousand one hundred two dollars with

fourteen hundred forty dollars escrowed for taxes, for a total of twelve thousand five hundred forty-two dollars.

The monthly rental from the single sub-tenant is thirteen thousand one hundred five dollars.

Q What is the net differential?

A The net differential?

Q Is that approximately five hundred dollars a month or six thousand dollars per annum?

A Yes.

Q Now, you spoke of a single sub-tenant. Could you tell me who the sub-tenant is?

A GWS.

Q Do they have a written lease?

A Yes.

Q What is the expiration date of that lease?

A It expires 5/31/74.

Q Well, does that single sub-tenant occupy the entire warehouse?

A Yes.

Q Is this a one hundred twenty thousand square foot warehouse?

A Yes.

Q Can you tell me how much per square foot they are paying here per annum, what their rental works out to?

A I believe it's one dollar nine cents.

Q Based on your experience with the company can you tell me what the going rate is for comparable warehouse space in the same area as this warehouse is?

MR. ZIMMERMAN: Objection, Your Honor.

THE REFEREE: I haven't heard enough to qualify him as to experience generally and as to his particular knowledge of the area.

Q Mr. Flanagan, you have previously testified you were employed by the debtor for nine years, is that correct?

A Yes.

Q Were part of your duties the supervision of warehouses along the Eastern Seaboard?

A Yes.

Q Was Miami one of the areas under your direct supervision?

A Yes.

Q Is that area still under your direct supervision?

A Yes.

Q During the period or the years that you discharged your duties, did you have occasion to inquire as to the market rate for the renting of warehouse space in the Miami area?

A Yes.

Q Have you, yourself, been in the Miami area?

A Yes.

Q Does the Overmyer organization have other warehouses or did it have other warehouses in the Miami area?

A Yes.

Q Now, I ask you, based on your experience and knowledge and visits to the area, do you have any opinion as to the going market rate for comparable warehouse space in the area of the Miami Number 7 warehouse?

A Yes.

Q What is the approximate figure?

A I believe it would range from one dollar thirty-five cents to one dollar fifty cents a square foot.

Q The present tenant is paying one dollar

nine cents?

A I think that is the correct arithmetic. I haven't pencilled it out, but I believe that is correct.

MR. SANDLER: No further questions.

CROSS-EXAMINATION BY MR. ZIMMERMAN:

Q Mr. Flanagan, you testified that you were getting various information from the records of the debtor. What records are you speaking about?

A The records that indicate the location of the building, the square-footage, the tenants, the monthly rental due from the sub-tenants and the rental due to the landlords and the amount of taxes escrowed.

Q How would you characterize that record?

A How would I characterize the record?

Q Yes.

THE REFEREE: Do you understand the question?

THE WITNESS: I really don't know what you want me to say.

Q Do you have the record from which you got that information here today?

A No.

Q Yes or no?

A I have a summation of this information that is kept in the normal course of business.

Q Was the summation prepared in the normal course of business?

A Yes.

Q Who prepared it?

A Specifically?

Q Yes.

A The individual?

Q Yes.

A It would normally be done by a man by the mame of Bob Shouldis, I believe.

Q Have you seen the records from which this information you have on this card comes from?

A Have I seen the base documents, the originals?

Q I don't know where the information comes from. Have you seen the source of that data on that card?

A I have not read the lease between the landlord and Overmyer which is part of the information contained.

MR. SANDLER: That has been stipulated.

A I have not read the tax bills from Florida that would indicate the tax amount, so if this is what you are asking me, no, I have not.

MR. ZIMMERMAN: Your Honor, I ask that his testimony be stricken.

THE REFEREE: Overruled.

Q Mr. Flanagan, you just rendered an opinion about the market conditions in Miami. What specifically do you base your opinion of one dollar thirty-five cents or more a square foot on?

A What basically do I base it on?

Q Yes.

A I base it on my personal knowledge of the market by visiting it, by supervisions the sale of lease sales in the Miami area for over four years, processing the leases that the Overmyer Company processed in the Miami area.

Q When was the last time you leased warehouse space in the Miami area?

A I don't believe the Overmyer Company has leased any since the 16th of November. There are leases written in September and October of this year.

MR. BLUM: '73.

Q Could you be specific and identify the

leases and the terms?

MR. SANDLER: I am going to object. I think the witness has already established his ability to testify.

THE REFEREE: I think it's sufficient. He has done so.

What was the price of the last lease you negotiated in that area.

THE WITNESS: I believe the last lease, and I would have to check the records to make positive what I am saying is correct, I believe it was one dollar fifty-five cents a square foot.

THE REFEREE: One dollar fifty-five cents?

THE WITNESS: Yes.

Q How many square feet were rented?

A I believe it was forty thousand square foot.

Q Was that one building?

A The forty thousand was one section of one building.

Q How long was that lease for?

A I believe it was three years.

Q Are you in the midst of renegotiating with this sub-tenant's lease on these premises?

A I have not conferred with the sub-tenant on this premises with regard to renewing their lease.

Q Has the sub-tenant discussed this matter with you or anyone at Overmyer?

A He has not discussed it with me.

Q Has he expressed any opinion that he is not going to renew his sub-lease?

MR. SANDLER: Objection.

THE REFEREE: Overruled.

A Not to my knowledge.

Q Would that sub-tenant discuss it with anyone else at Overmyer other than you?

MR. SANDLER: Objection to what the sub-tenant would do.

THE REFEREE: Sustained.

Q In your opinion as an expert, now, let's us assume that this sub-tenant does not renew. How long will it take to re-rent these premises?

THE REFEREE: How long do you think it might take?

THE WITNESS: In my estimate, it would take, perhaps, four months to completely fill

the premises.

Q How many tenants would you think you would need to fill these premises based upon your knowledge of the Miami market?

A The present situation, the premises as it sits is easily rentable into three segments of forty thousand each, roughly, without any modification, further partitions or anything else.

So, I feel it would be three or less tenants. It does not necessarily have to be.

Q In your experience in renting warehouse space in the Miami area, have you been involved with buildings that do not have a good appearance and that possibly leak when it rains?

MR. SANDLER: I object as speculative and not connected.

THE REFEREE: Well, I think, maybe, the question is not the most artfully phrased, but I think it's proper and I think the understanding with Mr. Flanagan is certainly there. Overruled.

A I believe I have been involved with the leasing of all of the Overmyer premises in Miami.

THE REFEREE: Including the one that

we are presently talking about?

THE WITNESS: This was the latest constructed building in the Miami area. So, this building in comparison with the other buildings in Miami is, at least, on a par with it, so my experience in Miami in re-leasing space would be in buildings comparable to this building.

THE REFEREE: Is this building in such condition now that a tenant could go into it without the necessity for expensive roof work, et cetera, by the landlord?

THE WITNESS: I believe so, yes, sir.

THE REFEREE: So that the only problem today, in the three or four-month period, is market problems and not the condition of the building, is that your testimony?

THE WITNESS: Yes, sir.

Q Have you received any complaints from the tenant about the condition of the building?

A I personally have not. I understand there is one section where there is a problem with the roof, some water. To what extent, I am not conversant.

MR. SANDLER: Excuse mr. Mr. Zimmerman. Mr. Guy is going to testify to that.

MR. ZIMMERMAN: That's all right.

THE REFEREE: It may be permissible cross. He may need the practice.

Q Mr. Flanagan, has this sub-tenant been paying its rent to the receiver?

THE REFEREE: Do you know?

THE WITNESS: I believe that it has not.

Q Do you know of any reason that has been expressed why this sub-tenant has not been paying his rent to the receiver?

A It's my understanding that the sub-tenant is confused as to where his rent check should be tendered which is the reason rent has been withheld.

Q What is the basis of that understanding?

A What is the basis of it?

THE REFEREE: Of your understanding why the sub-tenant isn't paying; how do you come to that knowledge?

THE WITNESS: Part of my responsibility is as collector of the rents for the receiver. In this capacity there are several people that

are responsible to me. We review the buildings on a weekly basis. It's in their report to me where I would gain this information.

Q Who would have made this report on this building?

A I would have to go take the building list out to determine who is responsible for this specific building.

Q Do you have the thing set up on a regional basis?

A I have it set up on a building basis depending upon the individual's background and association and, perhaps, the tenant, and try to have multi-occupants, the same company that occupied several locations, handled by the same individual.

MR. BOOTH: Would you mind asking counsel to step back. I can't see the witness or Court.

THE REFEREE: Why don't you ask him.

MR. MARGOLIS: I think, Your Honor, they shouldn't load up the whole table.

THE REFEREE: Mr. Margolis, Mr. Zimmerman is handling this. I think we are going well beyond the direct. A lot of this goes to

the testimony that Mr. Guy will give.

MR. SANDLER: We discussed this with Mr. Zimmerman yesterday. Mr. Guy said he had to leave on a maintenance problem. I would have kept him here if I thought - -

THE REFEREE: I do think, Mr. Zimmerman, a lot of what you now seek to elicit will probably, after my sitting here on many of these trials, come from Mr. Guy. I will allow you a little more latitude.

MR. ZIMMERMAN: This gentleman is in charge of sales.

Q Mr. Flanagan, have you visited this premises lately?

A I was in Miami in the late spring.

THE REFEREE: Late spring of last year?

THE WITNESS: '73.

THE REFEREE: Nine or ten months ago?

THE WITNESS: Yes.

Q Did you personally visit these premises?

A Yes.

MR. ZIMMERMAN: Your Honor, I hesitate to close my cross unless I can find out the identity of the individual who has been handl-

ing the direct communications with the sub-tenant because I think that information is pertinent to this case and I would like to have him identified.

THE REFEREE: Off the record.

(Discussion off the record.)

THE REFEREE: Can you give him the information so when we come back on the adjourned date, he will have it?

MR. SANDLER: There is only one sub-lease. We will bring the sub-lease to court.

THE REFEREE: The sub-lease or the person?

MR. SANDLER: Do you want the person who took the information from the sub-lease and put it on that card?

THE REFEREE: What is it you want?

MR. ZIMMERMAN: I want the individual who reported to Mr. Flanagan about the reason why this sub-tenant is not paying his rent.

THE REFEREE: Who was it who told you why he was not paying?

THE WITNESS: One of three people.

THE WITNESS: Give the names.

THE WITNESS: Kevin Conway, Bob Hirsch or Bob Landry.

THE REFEREE: Do you want them all here?

MR. ZIMMERMAN: Just the one that gave him the information.

THE REFEREE: Do you know?

THE WITNESS: I have the list at the office.

THE REFEREE: Secure for yourself the information and make that information known to Mr. Blum and arrange to have that fellow here on the adjourned date.

MR. BLUM: Yes.

THE REFEREE: I am going to defer the cross-examination. Whether it's probative we will see at that time. I am not at this time going to rule.

We will continue the examination, Mr. Flanagan, on the return date.

THE WITNESS: Yes, sir.

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L21

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

In the Matter
of

D. H. OVERMYER COMPANY, INC.
(FLORIDA),

Debtor.

No. 73 B 1134

United States Court House
Foley Square, New York, N.Y.

February 12, 1974
8:30 o'clock a.m.

LANDLORD'S MOTION FOR POSSESSION - MIAMI #7
HAHN, HESSEN, MARGOLIS & RYAN

Before:

HON. ROY BABITT, Referee In Bankruptcy

BARRY W. RAYVID
Official Court Reporter
U.S. Courthouse (R. 230)
Foley Square, New York, N.Y. 10007

APPEARANCES:

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PROCEEDINGS

THE REFEREE: Now, I have a recollection we had tried some of this case previously?

MR. SANDLER: Yes, in Miami Number 7. The landlord's case in Miami Number 7 consisted of the filing of the request for admissions, answer to the request for admissions. I put

Mr. Flanagan on and he testified on direct.

Mr. Zimmerman commenced his cross-examination and he never finished, and it was put over.

THE REFEREE: We will take them in any order you want. Why don't we finish the one we began so that the record will be coherent on an appeal.

We are dealing with Miami Number 7?

MR. ZIMMERMAN: Right.

THE REFEREE: We haven't done Buffalo Number 2 or Columbus Number 2?

MR. ZIMMERMAN: Right.

M U R R A Y G U Y, having been duly sworn by Honorable Roy Babitt, was examined and testified as follows:

THE REFEREE: Please give your full name and home address to the reporter.

THE WITNESS: Murray Guy, 74 Briar Brae Road, Stamford, Connecticut.

DIRECT-EXAMINATION BY MR. SANDLER:

Q Mr. Guy, are you presently employed

by the receiver?

A Yes.

Q In what capacity?

A I manage the engineering, construction and maintenance program.

Q Prior to being employed by the receiver, were you employed in a similar capacity by the debtor?

A Yes.

Q Would you state your educational and professional background?

A Enginneering graduate; I spent sixteen years in engineering and construction and I was a project manager with Pittsburgh Plate Glass Company; I spent one year as a consultant with Albert C. Martin & Associates of Los Angeles, and that is an architectural and engineering firm; I have spent the best part of a year with D. H. Overmyer and have been responsible for their engineering, development, design, construction and maintenance programs, international and domestic.

Q Is your present duty the supervision of maintenance and repairs at the Overmyer warehouses?

A Yes.

Q In that capacity, have you developed

a cost factor for the average cost of maintaining the warehouses in a state of repair with regard to routine maintenance?

A Yes. That figure is budgeted at two cents per square foot.

THE REFEREE: That's nationwide on all of the footage of this company?

THE WITNESS: Yes.

Q With regard to Miami Number 7, are you familiar with the present condition of that building?

A Yes.

Q Does that building presently require any work which is not routine, in other words, which would not be included in the two cent per square foot average?

A No. It requires some repairs but it falls within that budget.

Q When was the last time you were at the premises, when you inspected the Miami Number 7 warehouse?

A Wednesday of last week.

MR. SANDLER: No further questions.

CROSS-EXAMINATION BY MR. ZIMMERMAN:

Q Mr. Guy, what do you define as routine

maintenance?

A Repairs of a minor nature; let's say a job that wouldn't take over two or three days to do. Typical, is a door repair, patching of roofs, replacement of a leader, or patching of a gutter, breakage of windows, adjustment of dock bumpers, minor jobs.

Q Do you put a dollar classification on minor jobs or routine maintenance?

THE REFEREE: You mean generally?

MR. ZIMMERMAN: Yes.

THE REFEREE: I think that is entirely too broad. Ask him specifically what minor jobs.

How can he tell you? What is minor in one place might be fifteen hundred dollars some other place. This record is going to look idiotic.

Q Mr. Guy, would a job that costs five thousand dollars be classified as a routine maintenance job?

A No.

THE REFEREE: A single job?

A No, we would probably consider that a major repair.

THE REFEREE: How about a handful of jobs in one premises that might aggregate five thousand dollars - - gutters, landscaping, paving, some roof work?

THE WITNESS: If I looked at them and they exceeded appropriate for the annual expenditure of twenty-five hundred dollars, we would have to consider that abnormal.

If one review showed we were going to use all our monies in the next two weeks, then I would have asked for additional monies to support that building.

THE REFEREE: Is it possible, though, you might use monies for one building that you take from two others that don't need it out of that budget?

THE WITNESS: In fact, in Miami, we consider five buildings. There is one, two, three, seven and ninety-nine in that city. We are looking to spend twelve thousand dollars to fifteen thousand dollars annually.

THE REFEREE: On the five buildings?

THE WITNESS: Yes. It's possible that eight thousand dollars or nine thousand

dollars may have gone into one building and next to nothing on another.

Q Does Overmyer have a maintenance employee in Miami?

A None presently, currently, no.

Q Did it have one in the past?

A We handled Miami out of Tampa.

Q How many properties were in Tampa?

A I think two.

Q How many men did you have on your maintenance staff for Tampa-Miami?

A We had two people working out of Miami. They handled Orlando and went up to Georgia.

Q What kind of salaries did these gentlemen get?

MR. SANDLER: Objection as to relevancy.

THE REFEREE: Overruled.

A I would say an average salary of twelve thousand dollars for that - - or, fourteen thousand dollara a year.

Q Apiece?

A Yes.

Q Do you have any idea of what kind of transportation expenses they incurred running betwe

Miami, Tampa, Orlando and Georgia in a given year?

A If you are really interested in all those, I will tell you exactly if it's significant. I have all the budgeted figures and I will tell you when you go back to those particular buildings, it was very small. They are annual salaries.

They spent the best part of three or four months in Chicago last year. That deteriorated their salaries to a smaller amount.

The two men in question out of Tampa, one guy including expenses made twelve hundred sixty dollars a month.

Q When you say "including expenses," what does that mean?

A That means per diem of seven dollars fifty cents a day for him to do what he wants with that plus we would pick up air transportation if he had to fly.

Q Do you know if they flew between these places or drove?

A They didn't fly.

Q How far is it between Miami and Tampa?

A I don't know.

Q How far is it between Miami and Orlando?

A I don't know.

Q How far is it between Miami and Georgia?

A I don't know.

THE REFEREE: What is the point, Mr. Zimmerman?

MR. ZIMMERMAN: The point is there has to be something for air transportation involved here. The shortest distance is between Miami and Orlando - -

THE REFEREE: Let's get to these particular properties. I am no longer interested in generalities in the operation. Let's get to your property.

MR. ZIMMERMAN: I am.

THE REFEREE: I want to know what repairs have to be done, when they will be done, what they cost.

Q Mr. Guy, what repairs have to be done to the Miami property?

A Number 7?

Q Number 7.

A Currently?

Q Yes.

A On the basis of the major complaint that

I heard, which was in reference to the roof - - let me cover the other items first. I found that one dock bumper needed replacement; one door panel has fork truck damage which would be the responsibility of the sub-tenant; there are two areas in the paving that should be patched. The areas are, maybe, four foot by six foot in one area and two foot by four foot in another area.

There are three leaders that have been crushed by trucks. This is always a debatable thing, who pays for that, the tenant or the landlord - - the lessee - - ourselves. One man door does need to be repaired. That's been hit by a fork truck.

There is very minor beautification work but we might consider some work in fixing up the shrubbery around the office. Beyond that I physically inspected the roof thoroughly and investigated previous repairs with the roof, discussed the entire roof situation with a fellow by the name of Stanley Steinmetz (phonetics), the traffic manager for General Wholesale.

Mr. Steinmetz informed me that for a couple of years they never had any leaks in sections A and B of the building from the time after they moved

in. I believe they have been there a number of years, maybe six years.

MR. SANDLER: For purposes of clarification, there is a single sub-tenant which occupies this entire building. Mr. Steinmetz works for that tenant.

Q Can I interrupt here a second, Mr. Guy. Do you know how old this building is?

A I can look that up - - no, I don't exactly know.

MR. SANDLER: Would you continue your answer, please.

A I think he is referring to the thing that maybe, six years exceeds the life of a building. I am not so sure. I understood the guy to say he had been there for six years.

THE REFEREE: Even if it exceeds the life of the building, if the roof is in good condition and there is no need of any repairs, and if the roof doesn't leak - -

THE WITNESS: He is the original tenant and had never observed leaks in sections A and B.

Q How many sections are there, three?

A There is eighty thousand square feet and he never had leaks in that. The forty thousand feet in question that has leaked in the past, in September 1972, that roof, the whole corner, was blown out and we put about eight thousand dollars or nine thousand dollars of repair into an area of fifty feet by sixty feet.

Since that time there has been occasions of leaks in that section and it was obvious and I could see the stains on the floors, and reported damage to property and an office were given to me by Mr. Steinmetz and I would have to say what he told me was probably correct.

Q How much damage did Mr. Steinmetz report?

A In dollars, nothing. He said they had on occasion had to have crews work overtime and move the stock back away from this particular area, and there was flooding in the advertising manager's office to the point where materials in his file cabinets had been wet one time.

At the present time he has been put to a hardship of moving stock back approximately nine to ten feet away from t he door walls in that area and

store only pallets there because he does not want to be subject to additional material damage.

However, there has been no leaks in that building lately.

Q Mr. Guy, are you aware whether there has been any heavy rainfall in the Miami area lately?

A Yes. There has not. I discussed with the roofer - - I went up and made my own evaluation and reports there. Then I talked with the roofer and my evaluation was there was one additional area that could appear to still cause leaks and that's an external bubble on the roof and, also, an area where the roofing is not attached to the flasher.

Q Would you explain that, please, Mr. Guy?

A When you blow the corner of the roof off like that, you get air between the cellotherm insulation and decking and when the roof goes down, it's like trapping a bubble in there.

If they seal the roof right, you don't have that but sometimes you might have a bubble back there and there is no way for the air to get out unless it penetrates through your asphalt roofing, et cetera.

I observed a crown in the roof, a small crown in the roof, that you could move with your feet.

If you walked behind it, it would move down the roof a little bit. That's bad. When I talked to the roofer, I told him there were two other areas that should be repaired whether it leaked or not.

He agreed but he said his instructions were to make it water-tight and he felt he already had done that. I told him let's put the roof down solid - -

THE REFEREE: Remove the bubble?

THE WITNESS: And seal the area all along the flashings so that maybe rain wouldn't come in, but there is a possibility.

Q When was the roof repaired last on the property?

A Monday of last week - - no, Monday of last week he went purely to inspect. I think then at your client's request.

Q When was the last time he actually did repairs to the roof?

A He had been up there four times in the last six weeks. Maybe it was ten days ahead of that. He said to his best recollection he didn't have the roofer there. It was a week ago Wednesday. That would have been a week before I got there.

Q Do you know whether he did repair work when he was up there?

A You have to understand these guys. They work these jobs in as a fill-in when they have two hours at the end of a day - - they run and put a ladder up and do a little work.

He had four areas that he felt needed to be done. He had been back to work at them on four different occasions and accumulated only an expense of three hundred fifty dollars, to do that, so I have to believe that - - well, I could see where he worked and he is trying to secure a leak that you can't see and it's not the easiest thing to do.

Q What do you estimate as the total expense to make this roof water-tight?

A I have a firm price from the gentleman for seven hundred fifty dollars.

Q How many hours work do you think it will entail?

A That will be a three-man crew. It would take them not over three days.

Q What do you mean by "three days"? Would you be more precise?

A That's twenty-four hours.

Q Twenty-four?

A Crew hours.

Q Times three? Seventy-two man hours, is that what you mean?

MR. SANDLER: I object. It's obvious you don't work twenty-four hours a day.

THE REFEREE: No one said that. It's eight hours a day for three men, that's twenty-four, times three is seventy-two.

Is it your expectation that it would take that amount of time, more or less?

THE WITNESS: That's about right.

THE REFEREE: How about the price of ten dollars an hour for this situation, in this type of situation?

THE WITNESS: A union crew is seven hundred fifty dollars plus twenty-five percent overhead.

Q The overhead cost is what?

A What anybody charges.

Q What about materials?

A They are very insignificant for that kind of repair.

Q Is he going to guarantee his repair?

A Nobody guarantees a patch job on a roof. You can't get a bond for patching.

Q In other words, you can't be sure that this seven hundred fifty dollar repair is going to prevent the leaks?

A I can be sure if it does not I will fix it again until it does.

Q What is it going to cost to remove this external bubble?

A That's in the price.

Q That's in that price?

A That's in the price, fixing the bubble and putting more dead level on the roof, which is adhesive.

Q What repairs have been done to this property in the past? Major repairs.

A Minimal.

Q Minimal?

A This really is a good building, in very good shape.

Q How much is it going to cost to do these other minor repairs, the dock bumpers, leaders, paving, et cetera?

A Six hundred dollars.

THE REFEREE: In other words, we can get this building in good shape for somewhere in the vicinity of fifteen hundred dollars, is that what you are saying?

THE WITNESS: Yes.

THE REFEREE: The roof and all?

THE WITNESS: Yes.

THE REFEREE: Does that include painting?

THE WITNESS: No painting is required.

THE REFEREE: In any event, that would be in your large budge, this allocation?

THE WITNESS: That's right.

MR. ZIMMERMAN: No further questions.

MR. SANDLER: Thank you, Mr. Guy.

THE WITNESS: I would say - -

MR. ZIMMERMAN: No further questions.

THE WITNESS: We will fix the roof and it won't leak anymore.

THE REFEREE: Thank you. I hope you will; I suspect you will; in any event, I will direct you will.

MR. SANDLER: If Your Honor please, when the - -

THE REFEREE: Is that the testimony on Miami Number 7?

MR. SANDLER: When this first commenced Mr. Flanagan testified he had been advised by an attorney then, at the Overmyer office, Mr. Hirsch, about the sub-tenant's unwillingness to pay the rent at which time Mr. Zimmerman requested Mr. Hirsch be produced.

Over our objection he has been produced. Did Mr. Zimmerman want to call him as his witness?

THE REFEREE: Is he here?

MR. SANDLER: Yes.

THE REFEREE: Where did Mr. Hirsch come from?

MR. SANDLER: He works in the Overmyer office.

THE REFEREE: Are you going to finish your examination?

MR. ZIMMERMAN: I first wanted to put Mr. Flanagan back on the stand and finish my cross-examination. He has been previously sworn.

THE REFEREE: Not only once but thirty

SAMUEL H. FLANAGAN, recalled as a witness, having been previously duly sworn, was examined and testified further as follows:

RE-CROSS-EXAMINATION OF MR. FLANAGAN BY MR. ZIMMERMAN:

Q Mr. Flanagan, do you have your documents on this Miami Number 7 warehouse with you?

A I don't have the lease documents.

Q The documents that you testified from at the last hearing?

A Yes.

Q Could you tell us what the per square foot cost of this building is from those documents?

A The rent is eleven thousand one hundred two dollars; the escrow for taxes is fourteen hundred forty dollars; which is a total of twelve thousand five hundred forty-two dollars.

It's a one hundred twenty thousand foot building, or one hundred twenty-one thousand, two hundred fifty feet, so it's rated at ten cents per square foot per month.

Q How much is that per annum?

A It would be one dollar twenty cents per square foot per annum, I believe.

Q Mr. Flanagan, have you ascertained who it was who advised you why the sub-tenant wasn't paying his rent?

A Yes.

Q Who was that?

A Bob Hirsch.

MR. ZIMMERMAN: No further questions.

THE REFEREE: Mr. Sandler?

MR. SANDLER: No questions.

THE REFEREE: You are calling Mr. Hirsch as your witness?

MR. ZIMMERMAN: I request that the Court call him.

THE REFEREE: I call no witnesses. Are you calling Mr. HIrsch as your witness?

MR. ZIMMERMAN: I am calling Mr. Hirsch.

R O B E R T H I R S C H, having been duly sworn by Honorable Roy Babitt, was examined and testified as follows:

THE REFEREE: Please give your full name and home address to the reporter.

THE WITNESS: Robert Hirsch, 16 West

68th Street, New York City.

DIRECT-EXAMINATION BY MR. ZIMMERMAN:

A Mr. Hirsch, did you have a conversation with Mr. Flanagan regarding the reasons, the purported reasons, why the sub-tenant in Miami Number 7 was not paying his rent?

A Yes, I did.

Q What did you tell Mr. Flanagan?

A I told him what I ascertained by a phone call to the sub-tenant and then the sub-tenant referred me to his attorney in Boston, one Mr. Barry Rosenthal.

Q What did the sub-tenant say to you?

A He said that this matter is being handled "by my attorney in Boston." I am an attorney, also.

I didn't proceed to ask him any more questions except to get the phone number of Mr. Rosenthal in Boston.

Q Who did you speak to in Florida?

A Somebody in the accounts payables department. Even after he gave me Mr. Rosenthal's name I didn't bother to take his name down.

Q Had you had any other contacts with

Florida regarding this property?

A No.

Q Did you receive any letters from Florida regarding this property?

A Me personally?

Q Yes.

A I am sure there are a lot of letters that came in on all these properties. I didn't personally see them.

Q How did you come to be making contact with the sub-tenant on this property?

A I was hired to make phone calls with regard to collections.

Q Did you have a file that you studied?

A I saw they were a sole tenant, a big tenant, and hadn't paid December's and January's rent which is what the receiver was interestod in collecting.

Q There was no correspondence in that file to indicate any reason why they might not collect it?

A I just looked at our own files that the receiver had established on each site. I went through them and saw there was a large outstanding amount and one tenant, and it seemed to be one call

right away to find out why they weren't paying.

Q Was there any correspondence kept in that file?

A No.

Q Was that unusual or are all of the receiver's files on properties without correspondence relative thereto?

A Well, this file was not really the receiver's file. It's the receiver's file but it's for collection purposes.

You have duplicate copies of the invoices that went out. The idea was to keep them as strict as possible so you can find out who owes what.

Q Then you spoke to an attorney in Boston, is that correct?

A That's correct.

Q What did you say to this attorney?

A I asked him why - - I told him who I was and asked him why his client was not making rental payments.

Q What was his answer?

A Well, he spoke of the fact there was a leaky roof but he said that the main reason that he wasn't making payments was - - I talked to him about

fixing the roof but he said even if we do fix the roof the landlord has stated - - he said they were not going to pay us until this matter is resolved. That was his answer.

Subsequently, if I may continue, you presented us with a letter, I believe on February 5th or February 6th, directing the tenant to pay and you mailed it to GWS. I called Mr. Rosenthal last week, as soon as that letter was sent out, but he wasn't in. I talked to him yesterday.

He said he is going to call his client to see if, in fact, he received that letter and we can talk in connection with the roof being fixed. He said he will direct him to pay us as soon as we resolve the roof.

MR. ZIMMERMAN: No further questions.

MR. SANDLER: No questions, thank you.

THE REFEREE: Are you finished, Mr. Zimmerman?

MR. ZIMMERMAN: Finished on this one.

THE REFEREE: Thank you, gentlemen. Decision reserved.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

In the Matter
of

D. H. OVERMYER COMPANY INC.

Debtor.

No. 73 B 1134

United States Court House
Foley Square, New York, N.Y.

January 23, 1974
10:00 o'clock a.m.

LANDLORD'S MOTION FOR POSSESSION
(614 COMPANY - NICKERSON, KRAMER,
LOWENSTEIN, NESSEN & KAMIN, ESQS.)

Minneapolis 4

Before:

HON. ROY BABITT,
Referee In Bankruptcy

BARRY W. RAYVID
Official Court Reporter
U.S. Courthouse (R. 230)
Foley Square, New York, N.Y. 10007

A P P E A R A N C E S :

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-and-
WILL B. SANDLER, ESQ., Of Counsel
-and-
MICHAEL KLEINERMAN, ESQ., Of Counsel

MR. DANIEL H. OVERMYER,
President of the Debtor

- - - - -

P R O C E E D I N G S

THE REFEREE: This is the ten o'clock Nickerson, Kramer matter, Minneapolis Number

4; this is the 614 Company?

MR. SANDLER: Yes.

THE REFEREE: We have an answer here from - - one order was signed in this, wasn't there?

MR. WEINBERGER: You vacated it, Your Honor.

MR. SANDLER: That's the one where we moved to vacate the consent.

THE REFEREE: We have an affidavit of Mr. Weinberger and we have a response by the debtor in support of the application by the receiver, and I have the answer - - where is the answer?

MR. WEINBERGER: It's attached, I believe.

MR. BOOTH: Why don't we proceed on the basis of the original papers, the original application, and the answer?

MR. LIFLAND: Your Honor signed an order deeming that to be the original answer but I don't see the order with these papers.

MR. WEINBERGER: Your Honor, just to complete the record of the papers, there

have been submitted - - I submitted a memorandum of law last week and I believe you put it with - -

THE REFEREE: It goes to the termination?

MR. WEINBERGER: And possession.

THE REFEREE: I put them altogether.

MR. WEINBERGER: If there is a response on the part of the receiver, I would like to get it.

MR. SANDLER: If Your Honor please, we have agreed to stipulate, on connection with the landlord's case, the existence of the lease; that an act of bankruptcy as defined in the lease occurred in these proceedings; and that a bankruptcy notice of termination was sent by the landlord to the debtor.

THE REFEREE: When was it sent, after the petition was filed?

MR. WEINBERGER: November 27th.

THE REFEREE: I had an order to show cause by the receiver where I granted the order to vacate. That order was signed?

MR. SANDLER: Yes, sir.

THE REFEREE: What I really have now before me is the order to show cause brought on by the 614 Company filed December 6th and adjourned from time to time?

MR. WEINBERGER: That is correct, yes, sir.

THE REFEREE: Go ahead.

MR. WEINBERGER: On the basis of the stipulation I would move to strike the third affirmative defense in the answer.

THE REFEREE: Let me ask this question, are you putting in proof on the issue of another breach?

MR. WEINBERGER: No, not on the issue of other breach.

THE REFEREE: For example, non-payment?

MR. WEINBERGER: Non-payment will only go to the question of the conditions which this Court may find must be met before it can invoke any doctrine of non-termination.

THE REFEREE: Let me look at the third

defense which you speak to. I would say that the third defense has now become moot.

MR. SANDLER: What was the date of your notice?

MR. WEINBERGER: The date was November 27th.

MR. SANDLER: At that time, it was premature.

We will withdraw the third affirmative defense from the answer, in an effort to expedite these proceedings.

MR. WEINBERGER: The other point I would like to make sure of is whether the stipulation which we are putting on the record with respect to the lease, is a stipulation that that lease attached to the petition is the lease in question rather than there exists a lease. We all know that - -

THE REFEREE: This is the Edina Number 4 property?

MR. WEINBERGER: Yes.

THE REFEREE: A lease of January 27th, 1969?

MR. WEINBERGER: Yes.

THE REFEREE: I didn't understand Mr. Sandler would be getting over-technical.

MR. WEINBERGER: I think that is what he did intend but I just wanted to make sure of that.

L O W E L L J. N O T E B O O M, having been duly sworn by Honorable Roy Babitt, was examined and testified as follows:

THE REFEREE: Please give your full name and home address to the reporter.

THE WITNESS: Lowell J. Noteboom, and my home address is 11704 Live Oak Drive, Minnetonka, Minnesota.

DIRECT-EXAMINATION BY MR. WEINBERGER:

Q Mr. Noteboom, can you state what connection you have with the petitioner?

A I am a partner in the law firm of Leonard St. Andinard (phonetics) in Minneapolis and our office is counsel for the 614 Company, and I have personally been responsible for this matter since early 1971.

Q In your capacity as attorney for the 614 Company, have you ever had occasion to bring any legal actions against the debtor herein to recover any rent payments that you claim were due under the lease which has been stipulated to be the lease for premises known by the debtor as Minneapolis Number 4?

A Our office has commenced a total of four legal proceedings against D. H. Overmyer Company, Inc., the Minnesota corporation, which is the tenant under the stipulation. Those actions include three what we call under Minnesota law, fail detainer action and there is one civil action for the recovery of additional rent that we claim to be due under the lease.

Q What did that additional rent consist of?

A The additional rent action seeks additional rent of attorneys' fees incurred by the 614 Company as a result of the alleged violations of the lease by Overmyer as well as interest for late payments of monthly rentals which is also due under the lease.

Q What were the amounts claimed in that

action?

A If you will permit me to refer to the pleadings in that matter because that action was filed some months ago.

The balance sought at that time, as reflected in our complaint, included sixty-six hundred fifty dollars as per legal fees and expenses and an additional seven hundred forty-two dollars and fifty-five cents as interest for late monies - - as late payments for rent.

Q Now, other than the four lawsuits which you testified to, were there any other legal services which you rendered to your client, the 614 Company, with respect to this property as a result of any late payments or defaults by the debtor herein?

MR. SANDLER: Does this also go to the question of legal fees as additional rent?

MR. WEINBERGER: Yes.

MR. SANDLER: He can just give us the number.

MR. WEINBERGER: I will short-circuit this. I will withdraw that question.

Q Mr. Noteboom, I show you this document. Can you tell me what that is?

A The document you have handed me is a summary which I prepared from the work records in our office reflecting on a day-to-day basis the exact services which we rendered and in a large part which I personally rendered as a result of Overmyer's violation of the lease over the period of time from October, 1970 to December, 1973.

MR. BLUM: Objection to the phrase "violation of the lease." That's to be determined by this Court.

THE REFEREE: Overruled.

MR. SANDLER: May I get a point of clarification. Is this testimony now related to additional legal fees in addition to the number that we have already heard testified to or is this in support of the sixty-five hundred dollars?

MR. WEINBERGER: It's in support and includes on there, some amount which arose subsequently to the filing of that lawsuit. It is not cumulative.

THE REFEREE: Why don't you give us

the amount.

MR. SANDLER: I don't think we need a history.

MR. WEINBERGER: I am laying a foundation for the document.

MR. SANDLER: I object to the document. Give us the number.

Q Mr. Noteboom, did you compute the amount due for what you claim to be legal fees and interest owing to your client by the debtor?

A I have done that with respect to interest, the amount I earlier stated and sought in the lawsuit. That's the amount due. No additional interest has accrued since that date.

With respect to attorneys' fees, the document I have in my hand contains on the last two pages, a summary of the exact number of hours, the hourly rates, and the total amount incurred, including disbursements, and that total amounts to, for fees and disbursements, through December of 1973, not including any amount relating to the bankruptcy action itself, seventy-two hundred thirty-four dollars and twenty cents.

Q The hourly rate you used there, were

they the normal billing rates for the hours involved?

A They were.

MR. SANDLER: We will concede that.

MR. WEINBERGER: I will move to have this introduced.

MR. SANDLER: I am accepting your numbers, in affect. The attorney has testified he expended approximately seven thousand dollars in time.

MR. WEINBERGER: I move to introduce this document.

MR. SANDLER: I object to the introduction of this in the record, Your Honor. There is no reason to have this document which might invite an hour of cross-examination. He has testified to seven thousand dollars in legal services.

THE REFEREE: Why are you so concerned?

MR. WEINBERGER: Because this action is pending in Minnesota. I am concerned at a subsequent time the debtor will claim he doesn't owe any of these fees, that no tender has to be made, and we can't do anything about it because we are stayed in

Minnesota from proceeding with the action.

THE REFEREE: It won't be res judicata.

MR. SANDLER: What counsel is saying is that the leases could not be terminated provided we tender the rent arrears. Whether the legal fees be deemed rent arrears - -

THE REFEREE: What does the lease say?

MR. WEINBERGER: Paragraph 3.02 - -

THE WITNESS: 5.02.

MR. WEINBERGER: - -provides that legal fees incurred as a result of collection of rent and other payments that are in default are additional rents under the lease.

MR. SANDLER: We don't have to decide that now. I think whatever the lease says - - this Court has the jurisdiction to deem that as additional rent, counselor, and this Court certainly has jurisdiction over that question.

MR. WEINBERGER: I understand.

MR. SANDLER: We intend to await the ruling of the Court. We are not challenging the number. It's either within the lease or

out of the lease. I am conceding your number.

MR. WEINBERGER: If counsel will concede the number - -

MR. SANDLER: It's a question of law as to whether or not it's additional rent, and I am not going to attack the testimony of an attorney.

MR. WEINBERGER: On that stipulation I will not introduce the document.

THE REFEREE: Fine.

MR. WEINBERGER: Similarly, I had intended to introduce demand letters for payment of those amounts. If counsel here is conceding that the only question open is a question of law whether these amounts, as the testimony has indicated, are additional rents under the lease, I won't do that.

THE REFEREE: They do owe rent, don't they?

MR. WEINBERGER: Basic rent in this is not owed.

THE REFEREE: There are really two questions here, whether or not there's been

a breach of the lease for non-peyment of the legal fees which you say is rent and whether there has been a termination on the basis of the bankruptcy clause.

MR. WEINBERGER: The second question is correct. We did not exercise any termination predicated on the non-payment of rent.

This question of non-payment of additional rent goes if Your Honor feels Judge Judd's opinion applies here. One of the conditions of the opinion is the full tender - -

THE REFEREE: The question is whether the lawyers' fees in connection with arrearages and problems under the lease constitutes rent under the pledge of the lease.

MR. WEINBERGER: That is correct.

THE REFEREE: And, therefore, within the meaning of Judge Judd's ruling of the meaning of tender.

MR. SANDLER: We agree with counsel. If this Court were to sustain Judge Judd's we would happily tender.

MR. WEINBERGER: Needless to say,

my brief will clearly indicate our view that that is totally irrelevant.

THE REFEREE: Is Judge Judd's decision reported? The last xerox copy given to me is missing.

MR. BLUM: It's a full reporting in CCH.

MR. WEINBERGER: Just to make the record clear, can I deem marked as an exhibit my exhibits to the petition which constitute the lease and termination notice?

MR. SANDLER: No objection.

THE REFEREE: That's Exhibit "B", which is the lease and the November 27th, 1973 letter?

MR. WEINBERGER: That is correct, Your Honor.

THE REFEREE: I will consider it as a record before me attached to the papers duly filed before me and, therefore, consider it deemed in evidence and it is certainly before me as a part of the record.

Q Mr. Noteboom, I show you these documents. Can you please tell me what they are?

A The documents you have handed me are both an original and a copy of a letter of December 20th, 1973, directed to my client, the original directed to the 614 Company itself and forwarded to me, the copy referred directly by me.

The letter is from USCO Services, the sub-tenant, of one-third of the space in Minneapolis Warehouse Number 4, the one-third being approximately forty thousand square feet, and this letter is giving the 614 Company notice of USCO's vacator of the lease.

MR. SANDLER: I object to the introduction of that letter.

MR. BLUM: The debtor joins in the objection as a hearsay document.

THE REFEREE: Sustained.

THE WITNESS: It was received by me in the ordinary course of business.

MR. WEINBERGER: That is correct.

THE REFEREE: I can't cross-examine the writer.

MR. WEINBERGER: The only purpose of introducing it is to prove that the letter was sent and received, not the truth of the

statements contained in the letter.

THE REFEREE: In other words, if I receive this letter for the limited purpose of the fact that it was sent, apparently in due course and received in due course - -

MR. SANDLER: Then what relevance does it have?

THE REFEREE: This is not as to the truth of the intention to vacate the premises?

MR. WEINBERGER: That is correct.

THE REFEREE: What is the importance?

MR. WEINBERGER: The only relevance in that regard, Your Honor, would be that at least the petitioner here has received that notice. I request it be put in the record for that limited purpose.

THE REFEREE: Since it's that neutral, let's put it in.

MR. SANDLER: On that point, we reiterate again, we deem it irrelevant, Your Honor.

However, the application by the landlord itself said that this particular subtenant, USCO, intends to vacate and that the

two remaining sub-tenants - - there were three original ones - - the two remaining sub-tenants have agreed to take over the space of USCO. This is the landlord's sworn application.

Now, in considering that, it seems this has no relevance even if they did vacate the premises.

THE REFEREE: The premises are going to be occupied?

MR. WEINBERGER: Is - - Your Honor, if that is the basis of the objection, I will clarify that right now.

THE REFEREE: Yes.

Q Mr. Noteboom, in December of 1973, did you receive any indication from any of the other sub-tenants of the premises that they might be interested in taking over additional space within the premises?

A I personally, in my capacity as attorney, had been tending to that. The president of the 614 Company is ill and I have had responsibilities there that go beyond the normal counsel responsibilities.

We did believe in early December that the existing sub-tenant, Munsingwear, would take over the additional space. Munsingwear has since advised me there is not sufficient space to do that and there are no longer any plans to do so.

MR. WEINBERGER: Thank you.

MR. SANDLER: Your Honor, Control Data and Munsingwear have expressed desire to execute new leases.

THE REFEREE: As of this date, of your own knowledge, do you know whether or not Munsingwear and/or Control Data have executed new leases or have begun to negotiate new leases?

THE WITNESS: I do know they have not and are not interested.

THE REFEREE: To your knowledge, is that portion of these premises at this warehouse formerly occupied by USCO vacant now; has USCO vacated?

THE WITNESS: As of this date, no. As of January 31st they indicated they will.

THE REFEREE: You do not at this point know whether any commitments have been

made for the utilization of that space by others?

THE WITNESS: I know no such commitments have been made and there is nobody in the wings to speak of.

THE REFEREE: Have you drawn any papers in connection with your client in connection with that portion of the space?

THE WITNESS: I have not.

THE REFEREE: I don't think we need that.

MR. WEINBERGER: Fine. I don't see the receiver in the courtroom. If he comes in between now and the time this case is over, I would like to call him as a witness simply for the purpose of introducing a letter he received to the same affect.

THE REFEREE: If he has it, he has it in his file and I am sure Mr. Sandler will concede he has it.

Are you finished?

MR. WEINBERGER: I am finished.

MR. SANDLER: I call Mr. Flanagan.

S A M H. F L A N A G A N, having been duly sworn by Honorable Roy Babitt, was examined and testified as follows:

THE REFEREE: Please give your full name and home address to the reporter.

THE WITNESS: Sam H. Flanagan, 2 Chester Road, Darien, Connecticut.

DIRECT-EXAMINATION BY MR. SANDLER:

Q Mr. Flanagan, prior to the commencement of these proceedings, were you employed by the debtor?

A Yes.

Q In what capacity?

A Divisional manager.

Q For how many years were you employed by the debtor?

A A little over nine.

Q Are you presently employed by the receiver in the same capacity?

A Yes.

Q What do your duties presently consist of?

A They presently consist of sales and

marketing and collection of rents.

Q Are records kept by the debtor, now the receiver, in the ordinary course of business indicating how much is collected from sub-tenants at the various warehouses?

A Yes.

Q Do these records also indicate how much is paid out to landlords for rent and taxes?

A Yes.

Q Do you have such a record for Minneapolis Number 4?

A Yes.

Q Would you tell us what that record indicates in terms of collections and payments and the differential?

A It indicates collections of fifteen thousand two hundred thirty-seven dollars a month and the payments include seventy-six hundred ninety-eight dollars in rent and a tax allocation of thirty-two hundred fifty-two dollars for a total of ten thousand nine hundred fifty dollars which leaves a differential of forty-three hundred dollars a month, or fifty odd thousand dollars a year.

MR. SANDLER: Fifty-one thousand six

hundred dollars.

Q Are you familiar with rental conditions in the Minneapolis area?

A Yes.

Q How would you characterize those conditions?

MR. WEINBERGER: I am going to object. This man has not been qualified as an expert witness.

THE REFEREE: Overruled.

MR. WEINBERGER: It may be in prior proceedings but I haven't been here to see it.

THE REFEREE: I think I have heard enough on the basis of his experience with this company and - - this area is within your region?

THE WITNESS: Today it is.

THE REFEREE: How long have you had connection with this division which includes this region?

THE WITNESS: In Minneapolis, less than six months.

THE REFEREE: What occasions have you

had to study the situation in that area, in Minneapolis and the neighboring areas?

THE WITNESS: I have reviewed the marketing files with regard to Minneapolis, the files maintained on the marketing in Minneapolis. In particular, I - - on numerous occasions over the months in the past nine years, I have had personal relationships with Harriet Muller who was a former Overmyer employee and has placed most of the tenants in the buildings in the Minneapolis market. I have reviewed the files as to the market surveys, leases in existence, and have an association with the people directly involved. That would be the basis upon which I would draw my opinion.

MR. WEINBERGER: The objection is withdrawn.

THE WITNESS: In Minneapolis with regard to this building, conditions are good.

THE REFEREE: For the rental of this kind of utility?

THE WITNESS: Yes. Generally, the marekt is between eleven cents and fifteen

cents a square foot a month. Presently this building is running twelve cents. The cost is rated at nine cents, so the margin indicates among other things, that this is a good rental property.

MR. SANDLER: If Your Honor please, while I know the lease speaks for itself, I would like to point out that it - - including renewal options, there is a thirty-five year term on this lease at a fixed rent for fifteen years of that thirty-five years and then it reduces from seventy-six hundred dollars a month to fifty-six hundred dollars a month in the two ten-year renewal periods.

I have no further questions.

CROSS-EXAMINATION BY MR. WEINBERGER:

Q Mr. Flanagan, can you tell me of the fifteen thousand two hundred thirty-seven dollars a month monthly income that you receive from this property, how much of that is allocated to each subtenant in the property?

A Yes. USCO is fifty-two hundred dollars and Munsingwear is five thousand thirty-seven dollars; and Control Data is five thousand dollars.

Q Would it be fair to state, Mr. Flanagan, that if you only had Munsingwear and Control Data in that building, you would no longer be making a profit in that building?

MR. BLUM: Objection, speculative.

THE REFEREE: Overruled. It's a simple matter of arithmetic.

MR. BLUM: It's a simple matter of conjecture; it's a conclusion as to whether it would remain empty.

THE REFEREE: Overruled.

A The Munsingwear and Control Data income is ten thousand thirty-seven dollars and the present rent and taxes they pay out is ten thousand nine hundred fifty dollars.

Q So, the answer is there is a nine hundred thirteen dollar differential?

THE REFEREE: If Munsingwear or one of these five thousand dollar tenants should leave and you should not be able to rent that space, there would be a difference of five thousand dollars in your computations, wouldn't there be?

THE WITNESS: Yes.

THE REFEREE: What is the rent roll as it sits now?

THE WITNESS: Fifteen thousand two hundred thirty-seven dollars.

THE REFEREE: If one of these five thousand dollar tenants leaves, you are down by a third to about ten thousand dollars?

THE WITNESS: Ten thousand dollars.

THE REFEREE: What are the costs of the operations?

THE WITNESS: Ten thousand nine hundred dollars.

THE REFEREE: The break-even point is where you have rented about ten thousand dollars of space, is that your testimony?

THE WITNESS: Yes.

THE REFEREE: Is it within your knowledge on this property, likely or unlikely to the extent you are able to give me from your experience, that you can tell us what the prognosis is for rental of the, I would assume, one-third of the premises?

THE WITNESS: The projection would be it would be vacant less than three months.

THE REFEREE: Is it your expectation as things presently are in that area this would be vacant for a resonable period beyond the three months?

THE WITNESS: No, sir.

THE REFEREE: So, it's your testimony that within three months these premises would be rented, again assuming one of these tenants leaves?

THE WITNESS: Yes.

THE REFEREE: Supposing you were to find a tenant who had the particular need of the particular space in the particular area. What is your testimony as to how much of a lease could be drawn?

In other words, it's your testimony that the same rental could be charged as things are presently in the market in that area?

THE WITNESS: Yes.

THE REFEREE: Is there any possibility of betterment?

THE WITNESS: Yes.

THE REFEREE: On what basis do you come

to that?

THE WITNESS: Because the economy generally is on the increase.

THE REFEREE: The economy is on the increase?

THE WITNESS: Yes.

THE REFEREE: You couldn't get that from me. In any event, it's your testimony certainly if we rent within three months, or so, that is the period within which you predict the debtor could re-rent for the same amount reserved for any of the sub-tenants under the lease?

THE WITNESS: Yes.

Q Mr. Flanagan, I take it from your prior testimony you have no personal familiarity with the Minneapolis area?

MR. SANDLER: Objection.

THE REFEREE: Overruled.

A I have only visited the city once. I would have to say I have no personal knowledge of the area.

THE REFEREE: As a regionsl manager is it your experience that you operate from

surveys and marketing reports, and so on?

THE WITNESS: Yes, sir.

THE REFEREE: Is it your practice all over the country and all over your region?

THE WITNESS: That is not necessarily true, but there are a good many cities that I have operated in without visiting.

THE REFEREE: Because of market surveys and other reports from the areas and from other employees, is that the idea?

THE WITNESS: Yes.

Q What market surveys have you looked at here?

A The ones with regard to Minneapolis which were generated by company employees.

Q Mr. Flanagan, do you know as to any negotiations that are currently being undertaken with respect to the renting of the amount of space in the premises that will be vacated by USCO?

A The only knowledge I have would be third-hand, it would be hearsay.

Q Have you had any conversations with anyone with respect to the re-letting of that space?

A Yes, people within our own office.

Q Just within the Overmyer office?

A Yes.

Q Now, are you familiar with the property that was called Minneapolis Number 5 by Overmyer?

A I don't have the records here. Minneapolis 4 is the only property - -

Q Do you have any knowledge of a warehouse which Overmyer at one time leased in Roseville, Minnesota?

MR. SANDLER: I object to a line of questioning going to another warehouse. Certainly it was not asked on direct.

THE REFEREE: I don't know where Roseville, Minnesota is. I guess he is leading up to a comparable in a comparable area and what it would bring. I will allow it.

MR. SANDLER: Is that a warehouse owned by the same landlord as is in court today?

MR. WEINBERGER: Yes.

MR. SANDLER: Is that one of the leases that was disaffirmed?

MR. WEINBERGER: Yes.

THE REFEREE: We are going to take it. I am overruling the objection.

What is this Roseville property/ Do you know where Roseville, Minnesota is?

THE WITNESS: Only by reputation.

THE REFEREE: I am interested in nautical miles. How far from Minneapolis Number 4 is this warehouse, Number 5?

THE WITNESS: Without reviewing the records as to the specific warehouse numbers and locations and looking at a map, I am unable to answer.

Q Do you have records of Minneapolis Number 4 with you today?

A I have the rent roll.

Q Number 5, I am sorry?

A No, sir, I do not.

Roseville, I believe, is the first building in Minneapolis built by the Overmyer Company.

Q Do you know whether Overmyer had a lease in such a property?

A I believe the first building Overmyer built in the area was Roseville.

Q Do you know if Overmyer now has a

lease in such a property?

THE REFEREE: We have rejected it, didn't we?

MR. SANDLER: Yes.

THE REFEREE: I will take judicial notice of an order entered by me authorizing rejection under Section 313 of the Bankruptcy Act.

What is the difference in years between Roseville, Number 5, and Minneapolis Number 4?

THE WITNESS: I will have to go back to the records. I think it's several years difference.

THE REFEREE: Several years?

THE WITNESS: I believe it is.

Q Mr. Flanagan, in your listing of the figures that reached ten thousand nine hundred fifty dollars, I believe you included rent to the 614 Company and taxes.

Does the debtor here have the responsibility of maintenance on the premises?

MR. SANDLER: If Your Honor please. in prior trials the receiver has stated to

the Court that the receiver's insurance costs approximately one hundred fifty dollars per month for warehouse, and I would ask counsel to stipulate to that.

THE REFEREE: Of course, he was not present.

MR. SANDLER: That is why I am stating it.

THE REFEREE: It has been stated many times.

MR. SANDLER: Is that acceptable?

MR. WEINBERGER: Yes.

THE REFEREE: Did you compute that extra eighteen hundred dollars in the figure you gave us?

THE WITNESS: No, sir.

THE REFEREE: You did not?

THE WITNESS: No, sir.

THE REFEREE: That's eighteen hundred dollars for a year. You told me, if I recall, that there is a nine hundred dollar differential if that one-third goes vacant?

THE WITNESS: Yes, sir.

Q A month?

A Per month.

MR. WEINBERGER: It's a loss of nine hundred dollars.

THE REFEREE: That's eighty-five hundred dollars a year. Plus, the expenses of the premises brings it to a ten-thousand dollar loss if a third of the premises at Minneapolis Number 4 remains vacant for a year?

THE WITNESS: Yes, sir.

Q Now, Mr. Flanagan, in that ten thousand nine hundred fifty dollar monthly figure did you include any maintenance costs on the premises?

A No, sir.

Q Does Overmyer have the responsibility of maintaining the premises?

A Without having the knowledge of the lease I would believe that it does. It would be the normal custom.

Q What would you estimate to be the maintenance costs per month?

A I will have to defer that.

MR. SANDLER: We will have a witness to testify to the maintenance costs.

Q These costs were not included in your computation?

A No.

Q What about administration expenses?

A No, sir.

Q They were not included in your computation?

THE REFEREE: All you figured out was the money reserved under the lease and the money you are getting back from sub-tenants, that is, the gross return; you did not figure the allocation of the cost of operating, the administration expenses?

THE WITNESS: No, sir.

THE REFEREE: Your salary, for example?

THE WITNESS: No, sir.

THE REFEREE: Insurance?

THE WITNESS: No, sir.

THE REFEREE: Maintenance?

THE WITNESS: No, sir.

THE REFEREE: How old is the building?

THE WITNESS: I don't know.

THE REFEREE: Will somebody testify as

to age?

MR. SANDLER: What we have been doing is Mr. Flanagan has been testifying to the basic costs which is more than ninety percent rent and taxes. Insurance runs approximately eighteen hundred dollars per building pursuant to the receiver's statement.

Mr. Murray Guy, our construction supervisor, has been testifying to any immediate repairs plus the general history.

THE REFEREE: I recall him testifying. What about the allocability to the overall administration of the Overmyer empire?

MR. SANDLER: With due respect to the situation that the company finds itself in atthis point I think a report has already been made and certainly can be made again that the office overhead including employees in New York and branch managers at the commencement of these proceedings was approximately one hundred fifty thousand dollars per week.

It is presently under twenty thousand dollars per week. How that is allocated among

the remaining properties depends upon which properties are kept after everything settles into position. We do not know the number to divide into.

MR. WEINBERGER: If there is going to be testimony I won't object to counsel stating it.

MR. SANDLER: I am just trying to clarify.

THE REFEREE: There will be testimony.

Q Your computation makes no provision for an allocation for administration expenses of any kind to this property, is that correct?

A That is correct.

THE REFEREE: I will need, Mr. Sandler, at some point in these proceedings some testimony from the receiver. As the way things stand now I don't know how many properties we have left but I should think forgetting what I do and don't do I should know how many properties are being fought over by the debtor.

If it's one hundred properties it

should be very simple for Mr. Herzog to testify what he figures the projection is for a year and even if I arbitrarily allocate a certain figure for each warehouse we are fighting over I will get some kind of figure. I am going to have to have something at some point.

MR. SANDLER: I think we are talking approximately of, about one hundred properties.

THE REFEREE: We are fighting over one hundred properties; is that correct?

MR. SANDLER: That is right.

THE REFEREE: Not counting the fees or rejections. I will need testimony from the receiver as to what his economies have wrought from the standpoint of the overall yearly administration expenses from soup to nuts. I will need that at some point.

MR. WEINBERGER: Is that testimony going to be given in connection with all of the petitions?

THE REFEREE: I am hoping at some

point to get the receiver to testify to this. I don't know about cross-examination. If he were here now I could get it into your record, and I am sure after I synthesize it with your cross-examination there should be a residual so that Mr. Sandler could make a blanket statement which I would make a finding on first.

MR. WEINBERGER: If some testimony of that nature is going to be put on I would like to be given notice.

MR. SANDLER: We have no objection.

MR. WEINBERGER: I would like to reserve my rights. There is one other thing I would like to clarify.

Q Mr. Flanagan, you stated that the basic costs of operating the property, and you included in that rent and taxes, were ten thousand nine hundred fifty dollars, is that correct?

A Yes.

Q Can you tell me in precise dollar terms what the amount of Overmyer's profit or loss would be if the fifty-two hundred dollar monthly payment from USCO were not forthcoming in any given

month?

MR. SANDLER: I object. It's simply arithmetic at this point. Counsel can do his own arithmetic.

MR. WEINBERGER: I think, Your Honor, you may have misunderstood.

THE REFEREE: I thought he testified to about one thousand dollars a month. Isn't that what you testified to, nine hundred dollars, you said, or ten thousand dollars a year, roughly?

THE WITNESS: It got up to one thousand dollars and we add - -

THE REFEREE: We are losing twelve thousand dollars a year if one-third, roughly, of the premises remains vacant for a year. I thought that's what he said before.

MR. WEINBERGER: Fine, if that's what Your Honor understands.

MR. BLUM: No re-direct.

THE REFEREE: Should I ask you this question - - you have been a branch regional manager for nine years, right?

THE WITNESS: I was a branch manager

then a regional manager.

THE REFEREE: How many warehouses are covered by your region, roughly?

THE WITNESS: Eleven million square feet, roughly, ninety-two or ninety-three buildings.

THE REFEREE: Let's assume one hundred. Is it not the duty of a branch manager if he is doing his job and looking for tenants to have a rough idea of the administration expenses of the company?

You are not interested in gross figures, you are interested in a net figure, so wouldn't you be obliged to know if you were given charge of Boston, New York and Washington, three warehouses, wouldn't you be obliged to know whether you are running at a loss or profit on the bottom line?

THE WITNESS: Yes.

THE REFEREE: Wouldn't you have some idea from your experience of the ninety or so warehouses you ran how much is allocated to the running of the building from the standpoint of the operations of the debtor in its

main office administration?

THE WITNESS: Yes, sir.

THE REFEREE: Or, roughly that?

THE WITNESS: Yes, sir. These numbers are being worked on.

THE REFEREE: They are?

THE WITNESS: The physical administration here in the New York office would be a pretty simple number, it's a matter of arithmetic - - you have so many people, the payroll is so much and you divide by so many properties, and you could come up with a cost of New York administration in each property.

But, there is also a marketing or sales cost that will be involved to maintain and retain tenants. The marketing and sales approach has not been finalized so, therefore, it's difficult to put a cost allocation to what it's going to cost to operate a single building.

THE REFEREE: In other words, each building has its own sales force or resident sales force?

THE WITNESS: It's a little difficult for a man in Boston to lease a building in Minneapolis.

THE REFEREE: You have a man in Boston. Isn't that part of the operation of the building?

THE WITNESS: We do not have a man in Boston.

THE REFEREE: What you gave us before was the total dollars reserved under the lease and the total dollars to be picked up under the sub-lease?

THE WITNESS: Yes, sir.

THE REFEREE: You did not in any way tell us how much it costs for the on site administration of the premises?

THE WITNESS: No, sir.

THE REFEREE: You did not tell us how much is charged to those premises for the head of the Apex?

THE WITNESS: No, sir.

THE REFEREE: None of it?

THE WITNESS: No.

THE REFEREE: You gave me the bucks

under the lease and bucks under the sub-lease?

THE WITNESS: Right.

THE REFEREE: That we could all figure out, Mr. Sandler.

MR. SANDLER: I appreciate that.

THE REFEREE: You are not giving me, Mr. Sandler, on what I heard a clear bottom line figure and I am going to have to have that.

All this man did is multiply the lease by twelve, the sub-leases by twelve. He didn't count insurance, maintenance, administration on site, didn't count administration allocable to the big picture?

MR. SANDLER: Except, Your Honor, the numbers which he can give you probably account for ninety percent of the expenses.

MR. WEINBERGER: I have no way of knowing that.

THE REFEREE: I may have a property like this which is running a loss even if I accept Mr. Flanagan's testimony that he runs a profit when we are fully occupied

of about five thousand dollars a month.

MR. SANDLER: Forty-three hundred dollars a month.

THE REFEREE: When you are fully occupied it's less than that because I have two hundred books a month for insurance which isn't mentioned. So, I am now down to four thousand dollars.

I don't know what it costs for the on-site people; I don't know what you are charging New York for the New York people.

MR. SANDLER: Even if you took twenty percent off that you would go from fifty-one thousand dollars to forty-one thousand dollars. I don't think by any stretch of the imagination the other costs would run to twenty percent.

THE REFEREE: Your statements are not, after all, evidence.

MR. SANDLER: I would like you to bear with us for a minute. You are putting the insurance figure into each case.

THE REFEREE: That's diminimus.

MR. SANDLER: He doesn't know what

our home office expense is.

THE REFEREE: Who is going to give it to me?

MR. SANDLER: The accountant will prepare a statement. We will put him on as a witness.

THE REFEREE: Mr. Guy will give us maintenance?

MR. SANDLER: Yes. This leaves one further point, and that is what does it cost to do a rental in Boston if we no longer have a branch manager in Boston.

THE REFEREE: As far as I am concerned, that goes to the expenses of running the warehouse on site. I don't care how you run it, who runs it, but ultimately I am going to need a dollar figure whether you have an outside enterprise or whether you hire an on-site boss.

We are not really ready for any of these cases to be submitted completely tried. The problem here, Mr. Sandler, so you understand it, is I can't allow the debtor the luxury of time to play with accountants

and wait for accountants to submit the case fully to me to be tried. It's an imposition on people who want their property.

I should have assumed that by this point you would have given me bottom line figures.

MR. SANDLER: If Your Honor please, it's the landlords pushing for these trials. We have tried to accommodate them.

THE REFEREE: The burden of going forward is on your appeal to the Court's conscience.

MR. SANDLER: Your Honor, I would like to make this statement at this time - - the office staff has been stripped down to a skeleton.

THE REFEREE: I know.

MR. SANDLER: This month we will be in court five full days with our complete staff and we have a day or a day and a half for preparation before we come to court.

THE REFEREE: I know, it's a terrible burden.

MR. SANDLER: That means approximately

half of this month has been spent litigating instead of collecting the rent from the sub-tenants.

THE REFEREE: It's the receiver's duty to collect the rents; it's your duty to prepare the cases. I am sorry if I have been arbitrary but the nature of bankruptcy is I can't give you a week and drop everything else.

Mr. Flanagan's testimony thus far has not given me a bottom line figure. I can't allow you two months because your accountant will be busy with the tax season and the next guy will be somewhere else.

MR. SANDLER: I think that on the next date, next week or all day on the 30th and 31st, we will have it.

THE REFEREE: I am going to do it differently. By the end of next week I am taking the cases as tried. The burden is yours to go forward.

I don't think the duty of the Court or plaintiff is to give you X number of months to prepare your defenses. You are

obliged to go forward.

I can run my calendar and give you leeway because of the nature of the proceedings, but I can't say I will forget about it for six months while you go scrounging for the record you should have made the first month.

MR. SANDLER: Commencing with the 30th, which is the next full trial day, we will have the balance of the figures that you are speaking to. Of course, the figures will be the figures as of that time.

THE REFEREE: How do I give the right of cross-examination? When I was with the United States Attorney's office and I got one hundred Chinese all in the same position, all getting picked up tomorrow, it was very simple to prevail to the District Court to let me try one case and let them pick out which one they wanted. I can't do that here.

How if I am trying a case with this gentleman next week and get somebody to testify to the bottom line figure, what does

that do with this fellow?

MR. SANDLER: To date we have only tried three cases. Under those circumstances if the receiver gives the report on the 30th we will take his testimony - -

THE REFEREE: We didn't get into bottom line figures there?

MR. SANDLER: No, Judge, but counsel on the other side did not ask it on cross. Counsel today has been more diligent.

THE REFEREE: The burden is yours. I am going forward with this.

MR. BLUM: Your Honor, I have a solution. On the 29th, the first meeting date, the receiver will have to report to the Court, sir.

THE REFEREE: Not on this matter. He can give me a short report. I have two hundred matters on the calendar. Do you think I have one case assigned to me?

MR. BLUM: I suggest it because all creditors will be before the Court that that is an appropriate date.

THE REFEREE: It would be marvellous

if there could be some stipulation as to the bottom line figure, but how can I deny cross-examination to my friend, or this fellow, or even to you? There is not one of these cases that is going to be fully tried today; you are not going to submit them to me on the record you are making now.

On the record you are making now I have to grant this relief quite apart from forfeiture and windfall.

MR. SANDLER: Why is that?

THE REFEREE: These are losing property situations.

MR. BLUM: They are losing at the warehouse level.

MR. SANDLER: We are making fifty-one thousand dollars. The witness thought it would be re-rented within three months and there would possibly be a re-rent - -

THE REFEREE: That's a gross figure. I need a witness to submit - -

MR. SANDLER: We know the insurance figure and know that the home office overhead is down from one hundred fifty thousand

dollars to twenty thousand dollars.

THE REFEREE: What about on-site operations?

MR. SANDLER: We have no on-site operations. We have let go of all the branch managers. They are now negotiating a deal with the branch managers who are going to go into business.

THE REFEREE: Could not Mr. Overmyer testify as to what, today, the operations of this thing is?

MR. SANDLER: Can I consult with Mr. Overmyer for two minutes?

THE REFEREE: Yes.

(At this time a short recess was taken and all parties subsequently returned.)

THE REFEREE: Your next witness, Mr. Sandler, unless you are going to call Mr. Overmyer?

MR. SANDLER: I think we would need to refine some figures a little further, and we will be ready with this line of testimony on the 30th, and we will make an offer in every case that has been tried and give to

them a copy of the transcript.

Your Honor, we now come to the question of the appraisal and I would like to discuss it with this counsel and see if we could arrive at a stipulation that will save us an hour.

If Your Honor please, counsel have agreed to stipulate in lieu of the testimony of the debtor's appraiser, who is in court for the introduction of a written appraisal, that both parties will stipulate that the leasehold interest of the debtor and receiver has a value of one hundred thousand dollars.

MR. WEINBERGER: As of today.

MR. SANDLER: As of this date.

THE REFEREE: Fine. You will show me the relevancy of this in your memorandum?

MR. SANDLER: There will be fifty pages of relevancy.

THE REFEREE: If it has that value it can have the same value to a bankruptcy trustee on liquidation.

MR. SANDLER: Yes, sir.

THE REFEREE: The question here is

keeping the debtor alive so it can operate the premises. Of course I know there is going to be leasehold value. I don't have to be as dumb as I am.

A trustee or receiver can liquidate that property. Overmyer wants to run that property?

MR. SANDLER: Yes, Your Honor. The value in terms of running it is, as is in the record, in terms of the fact that a profit is made. As regards the existing value we are talking of approximately one hundred leaseholds that have value.

THE REFEREE: But, they have value to a bankruptcy trustee.

MR. SANDLER: If ten of those leaseholds were to be sold to create the funds to help this debtor survive - -

THE REFEREE: Let's sell them. Let him pare down his operations to a managable size and let's sell some.

MR. SANDLER: That is being worked on. One of the problems is you can't sell to a person when it's under a cloud.

THE REFEREE: I am not all that sure it has great material relevancy.

MR. WEINBERGER: I am not conceding that by stipulation.

THE REFEREE: I will take it as long as it's been stipulated and it's part of the record. To what extent I give it great weight is my problem.

M U R R A Y G U Y, having been duly sworn by Honorable Roy Babitt, was examined and testified as follows:

THE REFEREE: Please give your full name and home address to the reporter.

THE WITNESS: Murray Guy, 74 Briar Brae Road, Stamford, Connecticut.

DIRECT-EXAMINATION BY MR. SANDLER:

Q Mr. Guy, were you previously employed by the debtor?

A Yes.

Q In what capacity?

A Vice-president of construction, engineering and maintenance.

Q Do you presently occupy the same position with the receiver?

A Yes.

Q Can you tell us your professional background and experience?

A Eighteen years working in the field of engineering as a professional engineer, and sixteen of these with PPG Industries, managing their construction program.

I spent a year with Albert C. Martin & Associates in Los Angeles, an architectural and engineering firm; and part of the last year with the D. H. Overmyer Company.

THE REFEREE: What education have you had?

THE WITNESS: I have a degree in civil engineering.

THE REFEREE: From where?

THE WITNESS: University of Vermont, and numerous different additional courses in business administration and finance.

THE REFEREE: Where?

THE WITNESS: Whittenberg College; Akron University; Penn State. That's primar-

ily it.

Q Mr. Guy, were part of your duties with the Overmyer Company, the maintenance of existing warehouses?

A Yes.

Q When I refer to maintenance within the context of these questions, I am referring to ordinary recurring maintenance problems.

Were you able when working at the Overmyer Company, and based on your experience at the Overmyer Company, to set a general figure for the cost of maintaining these properties, assuming that Overmyer would be paying these costs?

A Yes.

Q What is that figure?

A We budgeted approximately two cents a foot.

THE REFEREE: For every warehouse, for every foot regardless of location? A property in Vermont is not necessarily like a property in Alabama?

THE WITNESS: That's an average because the northern properties took a little more because of the winter months.

THE REFEREE: Because of the beating they might take?

THE WITNESS: Because of painting, et cetera. We pro-rate a half a cent differential north to south.

THE REFEREE: What did you budget for the maintenance and continued well-being of the warehouses of the Overmyer Company?

THE WITNESS: Two cents.

THE REFEREE: How did you get to it?

THE WITNESS: We arrived at this by taking our annual administration expenses and salaries which were approximately one hundred eighty-five thousand dollars for the entire company and pro-rated that. Then, we took our maintenance, materials and supplies and added to that the expenses for what we call casual labor - - picking people out of labor pools, working them, putting in our major contracts for painting, roof work and paving.

THE REFEREE: An arbitrary leeway figure?

THE WITNESS: I don't understand.

THE REFEREE: How much did you budget for labor or how much for material?

THE WITNESS: Well - -

THE REFEREE: Or, is this in the trade the way it's done, take two cents a foot arbitrarily?

THE WITNESS: No, I have big, fancy records.

THE REFEREE: Tell me how you get to that?

THE WITNESS: Maybe I will tell you from the top of my head. We start off with direct salaries, for instance, of the national branch maintenance manager, a fellow headquartered in Atlanta. He had five superintendents across the country reporting to him. One is a specialist in roofs, the other is a specialist in painting, and the others are general superintendents.

In three of the cities, Chicago, Houston and Atlanta, we had a captive maintenance superintendent because our footage there was one million square feet or greater. In Chicago, it's close to two million. These

permanent items of expenses include (1) Administrative expenses which were pooled into what we call our general administration and supervisory budget costs. This is the budget just for the general maintenance budget.

On top of that now we added to that an overhead expense from general administration from the headquarters in New York and all travel expenses pro-rated from the last two or three years' expenses.

THE REFEREE: What was your total budget?

THE WITNESS: My last budget I submitted was one hundred eighty-seven thousand dollars plus we had a very active increase painting program, which we call a face-lifting program, which added about three hundred thousand dollars to that figure.

So, we totally expected to spend over the next twelve months in the order of four hundred thousand dollars, four hundred twenty-five thousand dollars.

THE REFEREE: Now, this was then

divided by the total number of feet. How did you get to the two cents?

THE WITNESS: As I explained before the two cents is what we call routine maintenance expenses. That would be taking this one hundred eighty-seven thousand dollars and putting casual labor into this - - such as, on the West Coast, we do not really have an organization that I administer out there because they are too far divorced and it was too expensive. Those local managers would perform their own maintenance and submit the cost back to us.

Taking my home office and adding to that the regional people, et cetera, we then arrived at a figure of about two hundred fifty thousand dollars. That was one hundred eighty-seven thousand dollars plus, approximately, eighty thousand dollars more, two hundred fifty thousand dollars.

The number of square feet was probably in the order of, at that time - - I might be guessing a little bit - - but we had it to be twenty-five million.

THE REFEREE: Twenty-five million square feet?

THE WITNESS: Yes.

THE REFEREE: And, the division leads then to two cents a square foot?

THE WITNESS: Yes.

Q Do you have a current report on the present condition of this particular warehouse?

A No, I was unable to get a current report on thisware house, unfortunately, without flying up there myself.

THE REFEREE: When did you have your last report of the face-lifting or the roof?

THE WITNESS: September 13th.

THE REFEREE: September 13th, 1973?

THE WITNESS: Yes.

THE REFEREE: What did it show at that time?

THE WITNESS: It showed this inspection was made on the basis of a person who was up there inspecting some new toilet facilities that were put in by one of the tenants, and I assume at the same time he was checking leases, and so on, but he indicated that the

building was in reasonably good shape.

MR. WEINBERGER: I object to this testimony.

THE REFEREE: Was this a regular employee of the company?

THE WITNESS: Yes.

THE REFEREE: Overruled. Go ahead.

THE WITNESS: And, did not indicate to me at any time there was any abnormal expenses.

THE REFEREE: When was the place painted last? Do you have records on that?

Incidentally, Mr. Sandler, if you feel I am intruding myself too much, I wish you would tell me. The Court of Appeals doesn't like lower court judges to get involved too much.

MR. SANDLER: For the record, we appreciate your moving it along.

THE REFEREE: What do your records show is the last time you had a paint updating in this situation, a roof situation, or whatever other problems you customarily run into in that area of the country?

THE WITNESS: My records do not show a report that would indicate that and do not show, also, the need for a paint job, roof job, et cetera.

THE REFEREE: Have complaints come in from subs?

THE WITNESS: No.

MR. SANDLER: I have no further questions.

THE REFEREE: Let me ask one more question and if it's out of line, someone make an objection.

Would you say that the formula which you have just described is the typical method in the operation of this kind, or similar kind, for the allocation for maintenance charges? Is this the usual method?

In other words, the total budget for maintenance from A to Z divided by the number of square feet adds up to the reserve, or whatever you call it, and allocates so much a foot for it?

THE WITNESS: Yes, and that is figured back into the operating regions' budget for

their profitability.

THE REFEREE: Go ahead.

CROSS-EXAMINATION BY MR. WEINBERGER:

Q Mr. Guy, have you ever seen this property yourself?

A No.

Q Is there a regional manager for Overmyer, for the debtor in this proceeding, in the Minneapolis area?

MR. SANDLER: Pertaining to construction or operations?

MR. WEINBERGER: Operations.

THE REFEREE: Mr. Flanagan testified he was regional manager.

Q Currently is there a regional manager?

A I can't answer that. I deal with people. I don't know their status.

Q Who is currently responsible for the maintenance of that building?

A I am.

Q In other words, if anyone had any complaints or any problems with the building, they would come to you?

A What is happening today is the receiver,

primarily Mr. Barbosa, receives this type of inquiry. He files it to me for review, comment and arrangements to eventually be made, et cetera.

Q Who would do the work?

A We would then go to our list of three or four qualified people who patch roofs and get a proposal from one or two people and hope we could get a competitive proposal.

If you complete a roof and the damn water is coming down through it, you call a guy and say look, we have a problem.

Q You mean, you would probably call somebody?

A We would call him. What I have done, again, is use the local managers. If I am dealing with Boston, I call the local manager in Boston and say we have this complaint, contact ABC and find out their price.

Q I am trying to find out if you have a local manager in Minneapolis?

A I don't know.

Q Do you have any figures on that, specifically?

A Wait a minute, now, I know who I would

contact in Minneapolis to get the work done.

Q Who would you contact?

A Can I get my briefcase?

Q Be my guest.

A My answer to your question is we have a big blank here, I have nobody's name here. Therefore, I guess there is no one I would be able to contact.

THE REFEREE: Supposing the roof were to bust today or yesterday, what is the chain of command so that ultimately the roof gets fixed?

THE WITNESS: If it's that bad, I would be the next man.

THE REFEREE: The roof has just split, the snow has caved it in and it's snowing there and the stuff is pouring in. What is the first step then besides grabbing a broom?

THE WITNESS: I would say they would call Joe Barbosa.

THE REFEREE: Who is "they"?

THE WITNESS: The sub-tenant.

THE REFEREE: Whoever's property was

getting wet is going to call Mr. Barbosa?

THE WITNESS: He is going to call the New York office.

THE REFEREE: He is going to call the New York office and say what is happening?

THE WITNESS: Right.

THE REFEREE: Who in the New York office is he likely to get ahold of?

THE WITNESS: Ultimately, it's my problem.

THE REFEREE: Are you up there on 42nd Street?

THE WITNESS: Yes, sir.

THE REFEREE: So, sometime this morning they are going to get ahold of you, Murray Guy?

THE WITNESS: Yes.

THE REFEREE: What is your next step then? Do you get ahold of Mr. Barbosa, Mr. Sandler or me, or what do you do?

THE WITNESS: They have a problem?

THE REFEREE: I just gave you the problem.

THE WITNESS: I take all the facts

down and then I would take it upon myself if it sounds like it's not an exaggerated problem, to contact two or three of the local roofers.

THE REFEREE: You don't have one guy on your list?

THE WITNESS: That's a major. I have all kinds of subs.

THE REFEREE: In other words, you have people in that area that you can get ahold of for plumbing?

THE WITNESS: Right, plumbing, painting and roofing - - glazing, masonry work.

THE REFEREE: You could within minutes get ahold of some guy in that area and then say that the problem is at the warehouse, the roof has caved in?

THE WITNESS: I would say get out there, take a look at it, phone me back telling me what your cost is to repair it. If it's going to cost two thousand dollars if I can't get it authorized, I might have to take the trip myself and see if I can do better.

A roof repair such as a split in the seam you can't let sit.

Q There is no regional manager or you have no record of any person?

A I don't know of one now.

Q Who takes care of Minneapolis or repairs everyday repairs at that property?

A At the present time?

Q Yes.

MR. SANDLER: That's assuming - -

THE REFEREE: Who shovels the snow off the parking lot?

THE WITNESS: The sub-tenants.

THE REFEREE: What is the practice if there is a drainage problem, a backup in one of your drains, and it's backing up into the warehouse, who takes care of that?

THE WITNESS: The only drainage that you would have within the warehouse itself would be the septic system.

THE REFEREE: Supposing the sprinkler system goes off accidently?

THE WITNESS: You brush it out the door.

THE REFEREE: Who, the sub?

THE WITNESS: We never did that.

Q Did you do any day-to-day maintenance in the premises?

A Our maintenance, primarily, and there is a certain latitude - - our maintenance is mainly structural integrity of the building and not usual maintenance.

Q Mr. Guy, you gave us a figure of two cents. Was that two cents per square foot per year?

A Two cents per square foot per year, yes.

Q Do you have any figures specifically relating to the property?

A With me?

Q Yes. With you or in your head, or briefcase or anywhere else?

THE REFEREE: How many feet do we have there?

MR. SANDLER: One hundred twenty-one thousand.

THE WITNESS: No, I do not.

Q Does that two cents per square foot include any reserve? As part of your computations,

did you make any reserve for extraordinary repairs that might become necessary?

A Like I was explaining to the judge, the two cents a square foot for routine maintenance does not include a national painting program or, say, the paving of maybe ten buildings a year which is a pretty good sized figure itself.

That will get you another penny or penny and a half. That's major repairs.

Q Have you made any allocation or do you have any figure which you would be prepared to testify to as an allocation for those major repairs not included in your two cents computation?

A For this building?

Q For this building.

A No.

Q What about generally?

A We had an entire program, a network of buildings. I remember the first few - - we were going to start with Peoria and get to Salt Lake City and do some work.

We had a program that would paint about twenty buildings over a year and paved about ten major areas.

Q My question, Mr. Guy, is in terms of a yearly, or whatever period you are using, budget for maintenance and repairs, have you arrived at any figure for the cost of major repairs?

MR. SANDLER: I think the witness testified to an extra penny or penny and a half over the two cents.

THE REFEREE: I thought he was going to get to that.

A To your building?

THE REFEREE: First, let's take a national average. You gave us two cents a foot national per year for the space you administer nation-wide?

THE WITNESS: Yes.

THE REFEREE: Do you add into that budget a nation-wide projection for large repairs? Supposing they all hit you at once?

THE WITNESS: We have a figure in this already, but the figure is based on storm damage.

THE REFEREE: In the two cents?

THE WITNESS: No, another penny or penny and a half.

THE REFEREE: In other words, another penny and a half spread nation-wide comprehends the roof now and then somewhere?

THE WITNESS: Storm damage somewhere or other situations that are of a large maintenance character. Let me put it this way so you will understand totally.

The question was aksed before, previously. We entered into a progrm that I discussed called face-lifting, where Mr. Overmyer or the Overmyer management said we are going to make a maximum effort to put our buildings in better shape and to do this we will allocate X number of dollars to do that. That X number at the time we started the program, which is a year ago in October, amounted to about a penny a square foot, a penny-penny and a half.

We cannot cintinue that program nationally. That has been suspended from our program.

THE REFEREE: How about a roof situation; supposing eighteen, twenty or forty of your buildings all split at the same time?

THE WITNESS: I will have to take that two cents over the country and put it into the roofs. You can't give the two cents.

THE REFEREE: In other words, the two cents maintenance there just testified to before, that comprehends large repairs where called for and comprehends no repairs of any importance in other places, right?

THE WITNESS: That could very well be.

THE REFEREE: I see.

THE WITNESS: To make it clear, the other penny-penny and a half I am talking about with that you might see a beautification of an upgrading program.

THE REFEREE: Nation-wide?

THE WITNESS: Yes.

Q Does that figure fit into the two-cent category?

A If we are lucrative with money, we put it into that one. Now it's in the two cent.

Q You testified you have not received any complaints from the sub-tenants. Have you received any complaints with respect to this property from the landlord?

A No, I have not.

Q No complaints on paving?

A None.

MR. WEINBERGER: No further questions.

MR. SANDLER: No further questions.

THE REFEREE: Next witness?

MR. SANDLER: We would like to close our case at this time, subject only to the introduction of evidence on overhead and cost of sales.

THE REFEREE: If the cases are not closed, you are reserving in my judgment the opportunity to complete your case by showing the bottom-line figure on these warehouses subject to the right of this gentleman to cross-examine and anyone else?

MR. SANDLER: Yes, Your Honor.

MR. WEINBERGER: I would like to recall a witness.

THE REFEREE: So that we are really fragmenting this until we can get updated figures. They are not going to linger long, Mr. Sandler. I think it's an imposition for an accountant to tell me I can't get it for

three or four months.

MR. SANDLER: We hope to have it next week.

THE REFEREE: You are on notice, counsel, when blanket testimony is introduced by Mr. Herzog or an accountant as to how much of the over-all operations is charged on an average you may be here to cross-examine as you see fit.

Counsel is recalling his first witness.

L O W E L L J. N O T E B O O M, having been previously duly sworn by Honorable Roy Babitt, was examined and testified further as follows:

RE-DIRECT-EXAMINATION BY MR. WEINBERGER:

Q Mr. Noteboom, have you within the past year engaged in any negotiations with anyone at Overmyer with respect to repairs at the premises which we are talking about today?

A I have. Commencing in the fall of 1972 I had occasion to inspect the parking lot, the paved area around the warehouse, Minneapolis Number 4, and since that time had occasion to discuss with local representatives and local counsel, Mr. Donahue,

the need for repairs.

I directed complaints to Mr. E. M. Connery, vice-president of Overmyer, to that affect at that time. To the best of my knowledge, no repairs have been affected. I do know as of two or three months ago, they were not, and repairs were needed to that parking lot or the paved area at that time.

Q Mr. Noteboom, are you familiar with a property owned by your client in Roseville, Minnesota?

A I am.

Q How far is that property from Minneapolis?

A The Roseville warehouse, Number 5, which is also owned by my client and had previously been leased to Overmyer, I would say is approximately equidistant from the downtown Minneapolis area as is the Number 4 warehouse, however, in different directions.

Q Roseville is which way?

A Roseville is northeast.

Q How many miles, approximately?

A Roughly ten to fifteen miles, and the

Edina is the same approximate distance in a southwesterly direction.

Q Was this Roseville property at one time leased to the debtor?

MR. SANDLER: I object to any further questions on this. We already put into the record that this other warehouse was given back.

THE REFEREE: I think it has some relevance on the question of the feasibility of this one, namely, it's in the same rough area.

MR. SANDLER: Not if it goes in different directions. It might be as different as night and day.

THE REFEREE: Look, this witness is an attorney - -

MR. SANDLER: I am an attorney, will you take my testimony?

MR. WEINBERGER: He is testifying to personal knowledge.

MR. SANDLER: I don't think he is qualified.

THE REFEREE: I will let him go a

little further beyond. Overruled.

Q Was this property leased to Overmyer in the past?

A It was. The lease existed at the same time as the property in Edina. It's the property returned as a result of the proceedings here.

Q Is the property occupied?

A It is not.

Q How long has it been vacant?

MR. SANDLER: I object. I has no relevancy; there has been no foundation laid. The fact one warehouse is empty means nothing. The other is full.

THEREFEREE: It may have some tangental value. There has been evidence here as to the prognoses for the other property before me. I think it may have some relevance, if not overwhelming, of what we can expect in regard of a property before me.

MR. SANDLER: Talking to a property ten miles north.

THE REFEREE: He said it bears the same distance in a northerly direction than the property before me.

Did you say ten miles from the center of the city?

THE WITNESS: I said ten to fifteen miles.

THE REFEREE: It seems to me to hear what is going on in Brooklyn Heights as compared to what is going on on 28th Street has tangental relevance.

MR. BOOTH: Can we inquire how far apart the two warehouses would be as a matter of distance?

THE WITNESS: Since the signs are almost juxtapost equally, it would be probably double.

Q How long have those premises been vacant?

A To my knowledge, approximately ten months.

THE REFEREE: Does this knowledge come to you on the basis of your representations of the owner of these premises?

THE WITNESS: It does, Your Honor.

THE REFEREE: You continually serviced this account with your firm?

THE WITNESS: I did.

THE REFEREE: Until?

THE WITNESS: I currently service the account.

THE REFEREE: I thought you said "I did."

THE WITNESS: I did at the time, I do now.

MR. WEINBERGER: I have no further questions.

THE REFEREE: What was the nature of the tenants in those premises, who were they?

THE WITNESS: At the time, the time the Roseville property was occupied?

THE REFEREE: Yes.

THE WITNESS: There was single tenancy there. I don't know the name of the tenant.

THE REFEREE: It's not Munsingwear or this other one?

THE WITNESS: That is correct.

THE REFEREE: It's not of that quality?

THE WITNESS: I can't comment on the

quality of the tenant.

RE-CROSS-EXAMINATION BY MR. SANDLER:

Q As a matter of fact, do you know of your own knowledge if there are other warehouses in close proximity of the Roseville warehouse?

A There are. They, in fact, are owned by Overmyer.

Q Do you know if there are other warehouses in close proximity of the Edina warehouse?

A there are.

Q In other words, there are other warehouses close to Edina and Roseville?

A They are both in what you might call warehouse districts.

THE REFEREE: You have been a lifelong resident of this area?

THE WITNESS: I have only resided in the Minneapolis area for approximately the thr ee years I have serviced this account.

THE REFEREE: Would you have any knowledge as to, perhaps, different considerations between the warehouse before me and Roseville, namely, accessibility to railroad yards and other things?

THE WITNESS: Well, I - -

THE REFEREE: Do you have any other such knowledge? Have you stopped to consider the difference between the Roseville property and the Minneapolis property from the standpoint of desirability?

THE WITNESS: Let me tell you only what I do know. I do know both of them stand in relatively close proximity. By "close," I mean a matter of a few blocks to major arterial four-lane highways.

To the best of my knowledge they are both close. I can't say whether they are absolutely adjacent to railroad spurs. As best I know it, they both are quite available to both of those means of transportation.

THE REFEREE: Since you are an attorney and I am sure you would not mislead the Court, is there any information you know from your own handling of these properties of material difference between the two which might have a bearing, for example, neighborhoods, condition of buildings, anything that you of your own knowledge know which might indicate that

one is different than the other?

THE WITNESS: There is not, Your Honor, but not to mislead the Court, I do want to point out I am not an expert as to that, so I am not denying there are differences. I am simply not aware there are any.

MR. SANDLER: I move to strike the testimony since the witness himself concedes he is not an expert witness. I don't think his testimony on why they are able to rent one warehouse and not the other - -

THE REFEREE: He ascribed no reason; he just testified one appears to be vacant for about ten months and their distance.

MR. SANDLER: I will withdraw the objection.

There is a stipulation of a value which regards the leasehold.

THE REFEREE: As I understand as I said, this has a tangental bearing.

MR. WEINBERGER: With respect to that stipulation, I only want to point out that has no relationship to what Mr. Sandler just said. That stipulation is made for this

proceeding only.

THE REFEREE: Don't be so worried. I can read a record, too.

MR. WEINBERGER: Before I close, I would like to ask Mr. Sandler on behalf of the receiver if he will stipulate the receipt of this letter otherwise I want to keep my case open to the time when the attorneys for the receiver are bringing on new witnesses and I will call the receiver.

MR. SANDLER: Your Honor, the original of this was received.

However, I object to the introduction of this in evidence. I think it might tend to distort the record in view of the fact the landlord's original application stated that that space was going to be assumed by one of the other tenants.

MR. WEINBERGER: That is not what the application stated.

MR. SANDLER: I will read it to you.

MR. WEINBERGER: The application states we hope.

MR. SANDLER: The application states - -

then your witness contradicted it. Our witne-s stated it can be re-rented probably at an increase.

THE REFEREE: Let me see what you are talking about.

MR. WEINBERGER: I really object to the mis-characterization. The petition stated what would happen on December 6th.

THE REFEREE: I don't think this adds anything, counsel, I really don't think so. The testimony indicates what the prognosis is and the evidence as to the other warehouses.

I don't think this adds anything. It's going to be conceded at the end of the month a third of the premises are empty.

MR. WEINBERGER: If that is conceded, I won't introduce it.

THE REFEREE: We have been proceeding on the assumption unless something drastic happens these people are out. I understand that; that is in the record.

MR. BLUM: I don't believe so, Judge.

MR. SANDLER: Our witness testified in the event of such a vacancy, he believes

it can be re-let.

THE REFEREE: Wasn't it testified to today, counsel, you had knowledge this sub-tenant would be out?

THE WITNESS: Yes.

THE REFEREE: That's in the record. None of us can speculate what is going to happen next week. I would suspect since the decision is going to be reserved by me, I would like counsel to ascertain what are the facts on February 1st and advise me by letter.

RE-CROSS-EXAMINATION BY MR. SANDLER:

Q Did you ever make any complaint with regard to the need for repairing in writing?

A I did.

Q Do you have a copy of any such writing with you?

A I intended to bring it with me. A quick review of my files didn't indicate it. I would be happy to look again.

Q You don't have anything with you today?

A I don't believe I do. I would require reviewing this - - the papers in my case. Counsel, I

have a specific recollection in reviewing, before I left Minneapolis, a letter directed to Mr. Connery. I don't have a copy of the letter with me.

I have located in my file a couple of pieces of correspondence that do relate to that question. One is a letter of September 8th from me directed to Overymyer's local counsel in Minneapolis, Mr. Richard Donahue, in which I explained this need for repairs.

I also have a filed memorandum of my own in which - -

THE REFEREE: That's over a year ago. We don't know that anything has been done since.

THE WITNESS: I know from having been there to look as recently as the fall of '73, that the asphalt mat which we are requesting, has not been installed. I am not purporting to testify as to September-October, 1973. One does not lay asphalt in September-October.

THE REFEREE: Of '72. Didn't you say September, '72?

THE WITNESS: That was the date of my initial request.

THE REFEREE: How do I know it wasn't repaired in April, May, June, July?

THE WITNESS: I do know from my own knowledge as of September of '73, it had not yet been accomplished.

THE REFEREE: Mr. Guy, you are still under oath.

Do you have any knowledge of the resurfacing of the parking area in this Edina warehouse?

MR. GUY: No, but I have a request. We received a request in April or May.

THE REFEREE: 1973?

MR. GUY: 1973, where they wanted to take the island away and make more parking area, and that would be paid for by the tenant. To my knowledge, I am sure that's been done.

THE REFEREE: Is that the Edina warehouse?

THE WITNESS: That's Roseville.

THE REFEREE: You have no knowledge of the modification of the parking area?

MR. GUY: I do not know.

THE WITNESS: Here's my letter. Paragraph 1 relates to Edina.

MR. SANDLER: If Your Honor please, I would like to mark the September 19th, 1972 memorandum that the witness has referred to and qualified as an exhibit for the receiver.

THE WITNESS: I would only ask permission if that's to be received that I be permitted to retain this and furnish the Court with a copy.

THE REFEREE: So that we are sure it's a copy I will let them mark this.

MR. SANDLER: Will you mail a copy to us?

THE WITNESS: Yes.

THE REFEREE: Incidentally, each counsel is responsible for his own exhibits.

MR. SANDLER: Your Honor, I have no more questions of this witness but I would like to correct the record in terms of a question put to Mr. Guy by the Court.

THE REFEREE: Let's call Mr. Guy so that counsel may cross-examine.

(At this time the said referred to memorandum was so marked as Receiver's Exhibit "1" in evidence.)

M U R R A Y G U Y, having been previously sworn by Honorable Roy Babitt, was recalled as a witness and testified further as follows:

RE-DIRECT EXAMINATION BY MR. SANDLER:

Q Mr. Guy, a question was put to you a few moments ago concerning the parking area, and the witness who was testifying at the time indicated your response to that question might be directed to another location other than Edina Number 4.

Can you clarify that?

A Yes, on Edina 4, which I know as West 76th Street, we had a request from Data Control operating in Minneapolis for A.

THE REFEREE: That's this warehouse?

THE WITNESS: Yes - - that we allow them to modify this parking area and put down new paving and let them pay for the work themselves.

THE REFEREE: You are sure this is the

warehouse?

THE WITNESS: The overlay is West 76th Street. The records and information I have indicates that they wanted to modify the parking area of forty thousand square feet.

We authorized those modifications on May 18th to our Overmyer attorney. Beyond that I have no knowledge of whether the job was done or not. But, at their expense we would have allowed it.

We made a note of the fact there was an infringement on the frontage but they would have to worry about that with the city themselves.

Q That was May of what year?

A '73.

MR. SANDLER: If Your Honor please, I think the record will now show based on the exhibit which I have just marked, consisting of the witness' memorandum, that the local attorney for Overmyer indicated that they had taken bids but there was a question of whether or not to proceed in view of the fact that the

landlord had an action pending to terminate the lease in the local court and why should the repairs - -

MR. WEINBERGER: I object to that. The exhibit will speak for itself; let it speak for itself. I have one question.

RE-CROSS EXAMINATION BY MR. WEINBERGER:

Q Aside from this particular request, did you receive any other requests from the petitioner in this action for Overmyer to do any work on the parking lot of those premises?

A Me, directly, I know of none.

MR. WEINBERGER: Fine. That's all I have.

THE REFEREE: Thank you, Mr. Guy.

MR. WEINBERGER: I just have two questions.

THE REFEREE: For who?

MR. WEINBERGER: Anybody.

MR. SANDLER: I will try to respond.

MR. WEINBERGER: On the cross-examination of the rest of the witnesses that you are going to put on my assumption is there will be a transcript provided?

THE REFEREE: There are not other witnesses except somebody to give me a bottom line figure. You have a right of cross-examination.

MR. WEINBERGER: After the transcript comes in?

THE REFEREE: I should hope it would be a lot better that you will appear.

MR. WEINBERGER: I would like to know when.

THE REFEREE: I would at sometime like to get an idea when the information will be available, when we can give Mr. Herzog or his accountant an opportunity to testify to let counsel who tried their cases at least know what is going to be offered at the Court's instance.

MR. SANDLER: We will communicate with counsel. If for any reason they cannot be here at that time we will provide them with a transcript.

MR. WEINBERGER: The second point is we were served with an order to show cause dealing with self-help which I gather Mr.

Lifland wanted adjourned to today.

MR. LIFLAND: Pardon?

MR. WEINBERGER: The order to show cause on self-help?

MR. BLUM: February 11th.

MR. LIFLAND: I am proceeding on February 4th.

THE REFEREE: That's the whole day?

MR. LIFLAND: Nine a.m.

MR. WEINBERGER: I would request that both sets of attorneys please send papers to me rather than local counsel in Minnesota.

MR. BOOTH: That was not our application. We have been trying to serve local counsel when possible.

THE REFEREE: Thank you, gentlemen.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

In the Matter
of

D. H. OVERMYER COMPANY INC.,
(VIRGINIA),

Debtor.

No. 73 B 1160

United States Court House
Foley Square, New York, N.Y.

April 18, 1974
10:00 o'clock a.m.

LANDLORD'S MOTION FOR POSSESSION (E. M. CARPENTER COMPANY, INC.)

Before:

HON. ROY BABITT, Referee In Bankruptcy

BARRY W. RAYVID
Official Court Reporter
U.S. Courthouse (R. 230)
Foley Square, New York, N.Y. 10007

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APPEARANCES:

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-and-
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BY: BERTRAM R. LIFLAND, ESQ., Of Counsel

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PROCEEDINGS

THE REFEREE: Give me the status of these rather bizzare proceedings. I have an affidavit of E. M. Carpenter.

MR. LIFLAND: We brought on a 69D motion, addressed to this landlord.

The landlord's pleading in response to the 69D, it was agreed that would consti-

tute the pleading with respect to the issues of termination and possession.

THE REFEREE: So that the paper filed February 4th, the so-called answering affidavit, constitutes and is to be treated as an independent application to lift the stay or give possession of the premises to the landlord?

MR. LIFLAND: That is correct, Your Honor.

THE REFEREE: I have your answer, that is to say, I have the receiver's.

MR. LIFLAND: If you don't have it, the debtor, for the record, adopts the answer of the receiver.

THE REFEREE: I take it the issues are the same as any other case you have tried here?

MR. SANDLER: There is one difference, which is that the landlord has been in actual operation for a period of months. To elicit the economic information concerning the property, we served interrogatories upon the landlord. The landlord has answered.

We have agreed this will be made part of the Court's records, and the transcript of the trial.

THE REFEREE: Let it be filed.

MR. ABBERLEY: May I hand up the original answer to the interrogatories, as well as the memorandum of law.

MR. SANDLER: Do you have a copy?

MR. ABBERLEY: Yes. I will give it to you.

MR. SANDLER: Mr. Abberley, do you want to proceed? I will be happy to stipulate with you the existence of the lease.

MR. ABBERLEY: I agree to stipulate the existence of the lease, the lease dated December 9th, 1968, between Carpenter Realty Corporation, herein referred to as the landlord, and D. H. Overmyer Company, Inc., herein after referred to as the respondent.

MR. SANDLER: Can we also stipulate from what date you have been collecting the rents from the subtenants? Is that August 8th?

MR. ABBERLEY: August 9th, 1973.

MR. SANDLER: How much was due from Overmyer for the period prior to August 9th for unpaid rent?

MR. ABBERLEY: I would like my witness to testify to that.

Could I stipulate a technical point, and that is that E. R. Carpenter Company, Inc., is the successor corporation to Carpenter Realty Corporation.

MR. SANDLER: Fine.

MR. LIFLAND: We will stipulate.

C O L E M A N B R Y D O N, having been duly sworn by Honorable Roy Babitt, was examined and testified as follows:

THE REFEREE: Please give your full name and home address to the reporter.

THE WITNESS: Coleman Brydon, 2212 Floyd Avenue, Richmond, Virginia.

DIRECT-EXAMINATION BY MR. ABBERLEY:

Q Mr. Brydon, by whom are you employed, sir?

A E. M. Carpenter Company.

Q How long have you been employed by The E. M. Carpenter Company?

A Over three years.

Q When you first became employed by The Carpenter Company in 1970 - - was that the year?

A '71, I believe; February of '71.

Q In February of 1971, what were you employed as?

A Sales coordinator.

Q Were your responsibilities subsequently changed?

A Right, to that of credit manager of the furniture division for approximately a year.

Q Then, were your responsibilities then changed?

A Right, to credit manager of the corporation.

Q To credit manager of the corporation?

A Right.

Q As a part of your duties as credit manager of the corporation, were you responsible for the general management of the warehouse which is the subject matter of this litigation?

A Eventually, yes.

Q Are you familiar with the lease dated December 9th, 1968, a copy of which I show to you?

A Yes.

Q Are you familiar with the history of rent paid by the tenant pursuant to the terms of that lease?

A I am.

Q Did there come a point in time in June of 1973, when the tenant did not pay his rent?

A In June - - well - -

Q June of 1973?

A Yes.

Q Tell the Court, what, if anything, you did in June of 1973.

A On June - - I can't remember the date exactly - - but, anyway, per the terms of our lease, we had two notices to give them. The rental money was due and we are talking about the July rent here which was due on June 20th.

On June 22nd I believe we notified them that the rental payment was due and we had not received it. We waited ten days, we heard no reply, and we gave them their second notice that the rent was due and

payable and that they were in a state of default which they had fifteen days to cure.

Now, we did receive a check for which payment was subsequently stopped - - we received notice that the payment was stopped on that check, on July 23rd, and on that date we gave them another notice of default, another fifteen-day notice.

MR. LIFLAND: Are these notices in writing?

THE WITNESS: Yes, these notices were in writing by certified mail.

Q Mr. Brydon, I show you a check dated June 18th, 1973, a check drawn by D. H. Overmyer Company, Inc., and ask you if you can identify that check, sir?

A Yes, this is the check dated June 18th which we received in July and which subsequently had payment stopped on it.

Q Is this the check that purports to pay rent for the month of July, 1973?

A Yes.

MR. ABBERLEY: I ask that this be marked in evidence.

(At this time, the said document was so marked as Applicant's Exhibit "1" in evidence.)

Q Mr. Brydon, I show you a letter dated June 22nd, 1973, addressed to D. H. Overmyer Company, Inc., 201 East 42nd Street, New York, purportedly signed by you.

Will you identify that letter, please?

A This was our notification that the July rent had not been paid, the first notification.

MR. ABBERLEY: I ask that this letter be marked as Applicant's Exhibit "2" in evidence.

(At this time, the said document was so marked as Applicant's Exhibit "2" in evidence.)

Q Mr. Brydon, I show you a letter dated June 30th, 1973, addressed to D. H. Overmyer Company, Inc., 201 East 42nd Street, New York, which purportedly was mailed by you to them.

Can you identify that letter?

A Right, this was our second notification to them, that if we did not receive their check, it would constitute an event of a default and they had fifteen days to cure it.

MR. ABBERLEY: I ask that that be marked

in evidence.

MR. LIFLAND: No objection.

(At this time, the said document was so marked as Applicant's Exhibit "3" in evidence.)

Q Mr. Brydon, I show you a letter dated July 23rd, 1973, addressed to D. H. Overmyer Company, Inc., 201 East 42nd Street, New York, purportedly signed by you and mailed to them.

Will you identify that?

A Right. This was the letter that was in response to our receipt of the stopped check and again, which gave them fifteen days to cure it, and we also notified them at the time that their August rent was also payable.

MR. ABBERLEY: I would like this letter marked in evidence.

(At this time, the said document was so marked as Applicant's Exhibit "4" in evidence.)

Q Mr. Brydon, after mailing the termination letter of July 23rd, 1973, tell the Court what then happened?

A Well basically, we just prepared, during that time period, with our lawyers in Richmond, we - - we made the determination that if they defaulted at this

time, that we were through with Overmyer.

We made the determination that we wanted not only to declare a state of default, but take that opportunity to terminate the lease and we therefore, made preparations to terminat the lease.

Q Did there come a point in time in the early part of August, 1973, when you peacefully repossessed the warehouse building?

A Right, on August 8th, which was the termination date of the fifteen days, and we had not received anything.

Q What did you do on that day?

A We proceeded to have letters written and sent to the D. H. Overmyer Company in New York. A copy of this letter (indicating) was hand-delivered to the local manager in Richmond, and a copy of that letter plus an individual letter to each of the subtenants - - I believe there were seven at the time - - a copy was hand-delivered to each tenant, and if he also had an office that was different from the warehouse, a copy was posted on the warehouse door.

Q Mr. Brydon, having then done that, did you receive any communication from the Overmyer Company?

A No, we never had a reply.

Q At any time during August, September or October or November, for that matter?

A Never.

Q With respect to the so-called subtenants in the warehouse, did you have any communication or contact with them on or after August 8th, 1973?

A Yes.

Q What did that contact consist of?

A Well, one of the provisions of the lease was that we could declare the lease terminated and take over the building and collect rents from our tenants without any judicial process. It was stipulated in the lease that we could do that.

We therefore, called a meeting of all of the subtenants on August 9th and told them at that time what had happened and gave them the opportunity that we would offer to take them on and honor the leases that they had with Overmyer until such time as they expired. Then, we agreed we would be willing to negotiate new leases with them.

Q Subsequent to that time, what new lease was negotiated?

A Well, we negotiated a new lease right

away but only for the period of time - - in other words, we substituted our lease for any possible Overmyer lease and - - all of our leases were drawn and completed by October 9th, except for Hoerner Waldorf Corporation, who had their own lawyer in Minnesota. They wanted some special clauses in theirs.

Q So that on or about October 15th, 1973, the landlord had entered into the new leases with all subtenants except one?

A That is correct.

Q Mr. Brydon, the landlord has been collecting rent from these tenants since August 9th, 1973?

A Correct.

Q Since entering into new leases, the rents being paid are the rents called for by the new leases?

A That is correct.

Q Mr. Brydon, going back, prior to June of 1973, did you make an examination of the rent record of Overmyer in terms of when rents were paid to the landlord?

A Yes, I did.

Q Do you have that memorandum with you?

A Yes.

Q I don't think it's necessary to go in back of 1973, but tell the Court something of the rent history of Overmyer?

A Well, the rent history of Overmyer - - I will take '72 as an example. I will have to take '72 because I don't have it for '73.

Starting in January of 1973, is when we started sending out notices. Before this time we had not sent out any delinquent notices. As a result, their payments went - - these are the number of days late - - from twenty-nine in January, five, twenty-nine days, thirty-five days, twelve days, thirty-three, twenty-seven, twenty-five, twenty-two days and ninety-seven days late, sixty-seven and seventy-seven days late.

So, there was a trend towards the end of the year, towards the end of 1972, to get slower and slower.

MR. ABBERLEY: I have no further questions.

CROSS-EXAMINATION BY MR. SANDLER:

Q Mr. Brydon, in connection with the late payments you just testified to which kept getting later

and later, apparently all of those late payments in 1972 were accepted by the landlord, weren't they?

A Yes. Like I say, we had not sent out any notices at the time.

THE REFEREE: In other words, you had taken no steps under the lease either to note the default nor to terminate?

THE WITNESS: No. What we did do was send them an invoice for service charges.

THE REFEREE: You had not complied with any provision of the lease in the year 1972?

THE WITNESS: No.

THE REFEREE: What is the point, they didn't choose - -

THE WITNESS: They did pay us the services charges that were stipulated.

Q There was a continuous pattern of late payments which were accepted and the late payments were accepted by you until you sent your notice in June of '73, is that correct?

A I started doing that in January of '72.

Q As far as you know, they were accepted?

A That is correct.

Q You said notwithstanding the payments

were made, you did not give now any default notice in 1972, is that correct?

A That is correct.

Q I show you a letter dated April 20th, 1972, from McGuire, Wood & Biddle, writing as attorney for E. M. Carpenter, and I ask you to look at that letter and tell me if this is a default notice from the attorneys?

A I have no knowledge of this letter.

Q What is your understanding of it now as you look at it?

A This has something to do with taxes of which I am not aware of. I have no knowledge of this.

MR. SANDLER: If Your Honor please, this is a letter from the landlord's attorney. It's the original and I would like to have it marked as Receiver's Exhibit "A".

I think it will speak for itself.

(At this time, the said document was marked Receiver's Exhibit "A" in evidence.)

THE REFEREE: What is this supposed to do, Mr. Sandler? What does this prove, Mr. Sandler?

MR. SANDLER: It doesn't prove anything,

it shows a pattern of conduct.

THE REFEREE: Of nice people. That's what this fellow has testified to, they didn't bother them all this time.

Even nice people lose patience and because they have been patient and nice, they are now to be penalized because they have been patient and nice.

What is it you want me to get from the letter?

MR. SANDLER: If over a period of several years payments are accepted late, we are only talking about a one-month default.

THE REFEREE: Right. That's as if saying if over a period of years a wife permits her husband to beat her, she is precluded from getting a divorce.

MR. SANDLER: There is a question of waiver.

THE REFEREE: They waived all the defaults until they had it up to here. Then they had enough.

Q Mr. Brydon, at the time you sent your default notice in June of 1973, you stated that was for

the rent due, I believe, on July 20th?

A No, the rent - - this is a little confusing because it's unusual. It was ten days prior to the month in question.

THE REFEREE: July's rent was due June 20th?

Q Had June's rent been paid?

A Yes.

Q So that the notice was given for July rent?

A Right.

Q The testimony was a check was issued and payment was stopped?

A And payment was stopped on it.

Q So that when you went in notifying the subtenants to pay rent to you on August 8th, 1973, Overmyer was delinquent to you for the month of July, is that correct?

A They were delinquent for the month of July. They were late on the month of August which had been due on July 20th.

Q You are talking about July and August?

A Right.

Q Now, with respect to the tenant in the

building, can you tell me what you are currently collecting from Hoerner Waldorf?

A Per square foot?

Q I have a monthly rental of twenty-seven hundred fifty dollars, is that correct?

A I will have to refer to these notes.

Q Please do.

A Hoerner Waldorf, twenty-seven hundred fifty dollars, is not correct. We are currently getting thirty-two hundred fifty dollars now.

Q From the Virginia Folding Box who rents ten thousand square feet of space, are you receiving eleven hundred sixty-six dollars per month?

A If that's what it works out to - - it's one dollar forty cents a foot. We have not received payment from them. It just started.

Q Dillard Paper Company, our records indicate that the rental from that subtenant is in the amount of nineteen hundred sixty dollars a month. Is that correct?

A Dillard Paper Company, I don't believe that is correct. It was nine hundred fifty-eight dollars and thirty-three cents when they had ten thousand.

Q Now they have how many thousand?

A They now have twenty thousand at a rate of one dollar twenty-nine cents. It just started in March. I don't have the figures with me.

Q I believe if you will check my rate, it is nineteen hundred sixty dollars.

MR. LIFLAND: It's twenty-one hundred dollars.

Q Philip Morris, I believe, also has twenty thousand feet, is that correct?

A Correct.

Q They also pay one dollar twenty-nine cents?

A No, their lease was signed in September. It was the least lease that Overmyer - - I guess it actually hadn't been signed - - they agreed to sign it and I think they are there at one dollar fifteen cents now.

Q For the second space occupied by Virginia Folding Box Company of thirty-seven thousand feet, we show four thousand dollars?

A I think it's four thousand eight dollars and thirty-three cents.

Q We rounded it off to four thousand

dollars. Then there is H&D Division of Westbake Company, which we show paying thirty-five hundred dollars a month, is that correct?

A That was correct, I believe, up until February 15th. Now, we did renegotiate their lease agreement on February 15th and they are now paying four thousand dollars.

Q According to my figures, the current rent roll from subtenants is then sixteen thousand four hundred dollars a month, and I would like you to verify that for me?

A That may be true for this month. It fluctuates from month to month.

Q Right now it's sixteen thousand dollars, approximately?

A Approximately.

THE REFEREE: I get sixteen thousand four hundred eighty dollars.

MR. SANDLER: I have sixteen thousand four hundred dollars, something like that.

A You are leaving out the office space which is vacant and now - - it was filled.

Q Let's leave it out. The rental under the lease to the landlord, you have in front of you, was

ninety-three hundred forty-eight dollars a month, is that correct?

A With taxes, ten thousand eight hundred sixty-eight dollars.

THE REFEREE: That's a month?

MR. SANDLER: A month.

THE REFEREE: That yields about fifty-five hundred dollars.

MR. SANDLER: A month.

THE WITNESS: For this particular month. Now, Hoerner Waldorf Corporation is due to expire - - which is thirty thousand square feet - - it's eigher June or August, and we have no new subtenant for them at this time, nobody to come in and take the space. That will make a thirty-five hundred dollar fluctuation.

Q If the receiver was now to tender to you the one month and several days in the August period that was delinquent, would you accept that?

A No.

Q I don't blame you at this time.

A The primary reason was the total harassment of the late payments and the bother of calling up every month trying to get our money was just, frank-

ly, not worth it. This is not our primary business.

We are also not a group of doctors or lawyers, or anything else, where with whatever reason you want to have this type of arrangement - -

Q If the receiver was to sell and assign this lease to a responsible third party and simultaneously tender to you the arrears that Overmyer owes and have a new third party take over the rental payments to you, would you object?

A Yes.

Q We are saying - -

A We are a manufacturing organization and to us, space is money and there is always the possibility we would need to expand.

In fact, we are expanding all the time.

Q You mean, you might use some of the space for yourself?

A Yes, sir.

Q If you didn't do it in this building, you might have to rent it?

A Since this building is right next door to us, it might be a problem.

Q If you had to rent space, what would you have to pay?

A I have no idea.

Q I think space in Virginia is renting at one dollar thirty cents?

A One dollar forty cents is a rate that a tenant is paying but they also pay a penalty because they are on a month-to-month.

At any month after June, I could lose Virginia Folding Box Company and wind up making less than the rental amount or the amount that Overmyer could have paid.

Q Do you have a vacancy in the building right now?

A At the present time, as of last week, I had ten thousand feet. Now I don't because Virginia Folding Box Company did pick up that other ten thousand feet.

Now, I have a three thousand foot office and a one thousand foot office.

Q That are empty?

A That are empty.

Q Aside from the office vacancy, the warehouse is fully rented and is generating the sixteen thousand four hundred dollar a month rental income, correct?

A Right.

THE REFEREE: Against that we have about eighteen hundred dollars - - this is a one hundred twenty thousand foot warehouse?

THE WITNESS: One hundred sixty thousand foot. There are, actually, three buildings. Now we have acquired more.

THE REFEREE: That's about two thousand dollars a month of the operations of Overmyer attributable to this property which means that it yields approximately about thirty-five hundred dollars.

MR. SANDLER: A month.

I have no further questions.

MR. LIFLAND: I have one question, Judge.

The subtenants, Hoerner Waldorf, Virginia Folding Box Company and Dillard Paper Company and H&D, these were all Overmyer tenants, were they not?

THE WITNESS: Right.

MR. LIFLAND: There are no new tenants that you have picked up, these are the original tenants that were there in August then when you came and took possession, is that correct?

THE WITNESS: Well, we have negotiated new leases with them, yes, and - -

MR. LIFLAND: These were the Overmyer tenants you found in the building?

THE WITNESS: At the time, there was like twenty thousand feet vacant and we set up a new lease with one of the tenants that was already in there.

MR. LIFLAND: With an Overmyer tenant, is that correct?

THE WITNESS: Right.

MR. SANDLER: Thank you, Mr. Brydon.

MR. ABBERLEY: Nothing further, Your Honor.

Shall I ask for a dismissal of the show cause order or of the stay?

THE REFEREE: You can ask, but I will refuse it at this juncture.

MR. SANDLER: We do not need Mr. Flanagan's testimony.

THE REFEREE: I don't think so. You have gotten the rent roll from this witness.

What about taxes?

MR. SANDLER: The testimony was that

the cost of the ten thousand some odd plus dollars included taxes.

THE REFEREE: Right you are. I would ask the witness a question, if I might.

What is the total amount of the arrearage or the default of Overmyer? Is it just a month and a few days?

THE WITNESS: No, it's ninety-nine thousand dollars.

THE REFEREE: What is the ninety-nine thousand dollars?

THE WITNESS: This was not brought out.

THE REFEREE: I would like to hear about that.

THE WITNESS: We have one rental payment, one month, which is all we claim. After August 9th, there is the position we prorated and it comes to around twenty something thousand dollars. But, the building was in absolutely miserable shape.

THE REFEREE: In other words, he is in to you, actually - - forgetting anything else, the way the record now stands, Overmyer is in to you for at least two months' rent?

THE WITNESS: No, we don't claim two months because we feel as of August 9th, we no longer had anything to do with them.

THE REFEREE: So, it's forty days total?

THE WITNESS: Right.

THE REFEREE: At ten thousand three hundred dollars?

THE WITNESS: Yes.

THE REFEREE: What about the rest?

THE WITNESS: The building was in very, very sad repair. I have picturs and a letter from our engineers who went over there.

The roof was in bad shape, the floors were in bad shape, the whole building needed painting terribly. It had rust streaks - -

THE REFEREE: Rust streaks don't bother me. Tell me about the operable defects that might have inhibited operations?

THE WITNESS: The doors didn't work - -

THE REFEREE: How do you mean?

THE WITNESS: They had a door on there where the fork lift operator knocked into the plate. All doors needed renovation. They had doors that would either not go up at all, and

we actually paid - - well, we didn't actually pay, but the total was eighty-eight thousand dollars, or whatever it is, and the only thing we did not pay for yet but which we have had done, was to pave the driveway which was thirty-one thousand dollars, I believe - - forty-one thousand dollars.

THE REFEREE: It seems to me you could have paved the area around the Taj Mahal for that.

THE WITNESS: I will try it, that's all I can say. The amount of labor is staggering, but it's money w3 have paid.

THE REFEREE: Was there any roof damage that caused leaks, substantial leaks, not moisture?

THE WITNESS: Roof damage that caused leaks - - not so much - - there was some roof damage, but it was mostly in the flashings and also, the building had a plexiglass skylight around the top of it.

Since we were down in an area where you can say there is some delinquency, most of the plexiglass skylight had holes in it and water

and rain was getting in. This was done before and we fixed it.

There is a complete list of the work we performed on the building. Consequently, there is going to be a loss to us for several years because of the money we spent.

THE REFEREE: Were these repairs called to the attention of the Overmyer Company?

THE WITNESS: Yes, during the period between January and, let's say, August of 1973, we had written to Overmyer and told them aside from the monetary consideration part of their lease agreement was to keep the building in a reasonable state of repair.

THE REFEREE: What did it cost you to repair the doors?

THE WITNESS: I have a list here.

MR. ABBERLEY: Perhaps, Your Honor, if I could refresh his recollection with a letter that he wrote on the subject to his Richmond attorneys - -

THE WITNESS: Do you want me to tell you?

THE REFEREE: Only if it's in evidence.

THE WITNESS: To install bumper blocks, eighteen hundred dollars.

THE REFEREE: Had you advised the Overmyer Company that such were needed?

THE WITNESS: This was after the fact, this was after we had taken it over. We were fixing the building to what we considered a reasonable state of repair.

THE REFEREE: Had you at any time told Overmyer and given them a shot at it?

THE WITNESS: Yes, sir.

THE REFEREE: You had?

THE WITNESS: Yes.

THE REFEREE: Give me the circumstances under which you gave Overmyer first crack? Were they supposed to do all of the work?

THE WITNESS: Yes, sir.

THE REFEREE: Tell me how you told them they were supposed to get cracking?

THE WITNESS: We have a letter - - I have it back there, I don't have it with me. We wrote them a letter and we had our engineers go over and make a detailed list of everything that was wrong with the building and we pre-

sented that to them with a letter telling them they had thirty days to at least come up with some sort of a plan for repairing the building. We never got a response to that.

THE REFEREE: I want to know what you told Overmyer and when? I can't, after all, penalize the debtor because you decided to pave it as though it were the entrance to the Royal Palace.

You might as well pick up the questioning, counsel. I don't want to become more involved in this than I have already become.

RE-DIRECT EXAMINATION BY MR. ABBERLEY:

Q Mr. Brydon, did there come a point in time in May of 1973 that you wrote a letter to D. H. Overmyer Company, Inc. at 201 East 42nd Street, New York?

A I did not write that letter.

Q I show you a letter dated May 8th, 1973 and ask you to identify it?

A This was a letter written by our company, by the president to D. H. Overmyer notifying them of the lack of maintenance on the premises.

MR. ABBERLEY: I would like to have this letter marked in evidence.

MR. LIFLAND: I would like to point out, Your Honor, this is a letter of conditions - -

THE REFEREE: Let me draw my own conclusions.

(At this time the said document was so marked as Applicant's Exhibit "7" in evidence.)

THE REFEREE: This seems nice and honest and forthright - - send your engineer up, compare notes, and see what is wrong.

MR. LIFLAND: We may have done just that.

MR. SANDLER: We did, Judge.

MR. LIFLAND: I think the testimony will show that was done.

Q Mr. Brydon, referring to the letter written by Mr. Pauley, the president of the company, to Overmyer, dated May 8th, 1973, do you know of your own knowledge whether or not there was a response from the D. H. Overmyer Company, Inc. to this letter?

A To my knowledge there was no response.

Q Did anyone from the D. H. Overmyer Company, Inc.at any point in time thereafter, go to

the premises and discuss with you or anyone else, the repairs which you believed should have been made?

A No, they didn't. We specified - -

MR. SANDLER: I object.

MR. LIFLAND: How does he know if someone was there?

MR. ABBERLEY: I asked of his knowledge.

MR. SANDLER: You did on the prior question, not on the second question.

A To my knowledge, no, they didn't.

Q They had no discussion with you?

A No.

Q To your knowledge they had no discussion with anyone else?

A To my knowledge, that is correct.

Q Concerning the maintenance of the building?

A Correct.

Q Finally, let me ask you one last question. Referring to the letter addressed to McGuire, Wood & Battle, which I handed you a few moments ago which contained a list or an itemization of the work to be done - -

MR. LIFLAND: I object. There is no

reference to the list in the exhibit.

Q Will you identify the letter?

A This is a letter we sent to our lawyers listings maintenance that we had done on the building to bring it up to an acceptable standard.

Q This letter was written by you to your attorneys in Richmond?

A That is correct.

THE REFEREE: What is the date?

MR. ABBERLEY: February 6th, 1974.

A That's correct - -

MR. SANDLER: Objection.

MR. LIFLAND: There is no connection to this letter.

THE REFEREE: I don't see anything on that point.

MR. SANDLER: It's a letter to his own lawyer - -

THE REFEREE: I will sustain the objection simply because it's not important or relevant to the inquiry.

I am interested in knowing the total amount of the responsiblity of Overmyer remaining open at the filing of the petition.

Since the debtor makes so much of the fact he is only a month in default I am inquiring what might have been incurred by Overmyer but not paid?

Q Mr. Brydon, do you have in your records which you have with you any documentary evidence showing the extent of the repairs which remained to be done in the building to, in your opinion, properly maintain the building prior to November of 1973?

THE REFEREE: Simply state as of August 9th when you took possession of the building -- do you have any knowledge as to which you could now testify as to the physical condition of the premises which you, in your judgment, think necessitated repairs or proper maintenance?

MR. SANDLER: I object to the question, Your Honor.

THE REFEREE: Overruled.

MR. SANDLER: I thought you were stating counsel's question.

THE REFEREE: I am making my own question.

MR. SANDLER: I withdraw my objection.

THE REFEREE: As of August 9th, what was the condition of the building as you viewed it? What had to be done?

THE WITNESS: What had to be done as we viewed it was there had to be quite a bit done. The building looked horrible, it was bad inside, there were leaks, flashings they had problems with.

THE REFEREE: How about the bumpers?

THE WITNESS: No bumpers.

THE REFEREE: How about the doors, were they operable?

THE WITNESS: Some were, most weren't.

THE REFEREE: What was the physical condition of the concrete floor inside?

THE WITNESS: There were holes in the floor; there are still are holes in the floor.

THE REFEREE: What was the condition of the parking lot or roadway?

THE WITNESS: The parking lot was in very poor condition in that it had standing water on it after every rain and it had holes in it, and it was not in very good shape, even though it was reasonably new.

Q Mr. Brydon, have you, as the landlord, gone forward and, in effect, done any of these repairs to which you refer?

A Yes, we have brought the building up to what we consider a reasonable state of repair with the exception of a hole in the floor of the largest building and the sprinkler system.

Q How much money has been spent to effect these repairs?

A To date we have spent - -

THE REFEREE: Eighty-nine thousand dollars, it must be.

THE WITNESS: Less. Forty-four thousand dollars for the parking lot which we have not physically paid but since the work has been done, we will pay.

THE REFEREE: You mean, you put one hundred thousand dollars into the repair of that building?

THE WITNESS: Acting on the advice of our lawyers that it is.

THE REFEREE: It's worth it?

THE WITNESS: No - - it was our building as of August 9th and we were, frankly,

ashamed to have anything that looked that bad belong to us. We are a business organization and one thing we knew is we couldn't sell it.

THE REFEREE: Well, Overmyer was not responsible for the aesthetics, he was responsible to make sure it was operable as a warehouse.

RE-EXAMINATION BY MR. SANDLER:

Q Mr. Brydon, are you an engineer?

A No.

Q Are you a contractor?

A No.

Q Do you have any contracting experience?

A No.

Q When the repairs were made subsequent to August, was there competitive bidding done?

A Yes.

Q Were you personally involved in the competitive bidding?

A No. We have a purchasing agent that handled that.

Q Do you have copies of the competitive bids with you?

A Not with me. I only have a copy of the

final bill.

Q You testified your lawyers discussed with you spending money for repairs, is that correct?

A No, all we asked from our lawyers was to give us the necessary steps to terminate our lease with the D. H. Overmyer Company. This was, as you recall, in August when we had no idea, of course, there would be any Chapter XI proceedings.

Q I am sure your lawyers advised you how to terminate the lease. There was also testimony from you as to a discussion with your lawyers as to spending money for repairs after you were collecting the rents after August 9th?

A I don't believe I testified discussing with our lawyers spending money about repairing the building. If I gave you that impression, this is not correct.

Q Does the Carpenter Company have its own building next door to the Overmyer warehouse?

A Yes, sir.

Q Is it approximately the same size?

A No, it's approximately ten times bigger.

Q Were you concerned about the appearance of the Overmyer warehouse because of its proximity to

your own headquarters?

A I can't really say that was a factor, or anything.

Q It was no factor at all?

A It's hard to say.

Q What color is the Carpenter building?

A Red brick.

Q What color was the Overmyer warehouse after the painting?

A Light brown.

Q What was it before it was painted?

A White with rust strips.

Q Are you familiar with the name Bill Rause (phonetics)?

A Yes.

Q Who is Bill Rause?

A Bill Rause was the Virginia area manager.

Q For who?

A For D. H. Overmyer Company.

Q After the landlord sent the letter, I believe it was of May 8th, by the president about the need for repairs, wasn't there a telephone call or a visit from Bill Rause?

A I don't recall. There might have been.

Q Wasn't a meeting arranged between Bill Rause and the landlord's engineer?

A If it was, it was held by the president since this particular aspect was his project.

Q Were you aware of any such meeting between Mr. Rause and the engineer to go over complaints?

A I don't recall any.

Q Don't you know of your own knowledge that subsequent to that May letter Overmyer commenced paving repairs, very substantial paving repairs, at the premises?

A Of my own knowledge, I know there was some paving but as to the time that the paving took place, I don't know.

Q Well, it took place after May 8th, didn't it?

A I don't know; I couldn't tell you.

Q But, it might have?

A It might have, might not have.

Q Are you familiar with any other repairs made by Overmyer subsequent to May 8th?

A I did not set foot on the premises until sometime in May or June. That was the first time

I set foot in the premises over there, and I did not become familiar with the property until August 9th when I met the tenants.

Q So that, actually, you were not really familiar with the conditions of that premises prior to August 9th, is that correct, of your own personal knowledge?

A Of my personal knowledge - - I have the engineer's report which was requested by Mr. Pauley, who was our president.

Q I am not talking about your engineer's report, I am talking about your own personal knowledge.

You had no personal knowledge prior to August 9th, is that correct?

A Of the extent of the building damage?

Q No, the extent of the building's good features. Did you have any knowledge of the building's good or bad features prior to August 9th?

A No.

Q So that it's possible extensive repairs might have been made by Overmyer prior to August 9th, for all you know, that is possible, isn't it?

A That is possible, I suppose, yes, but

my inspection on August 9th certainly didn't indicate any.

Q Did you make a written inspection report of your own inspection on August 9th?

A No. We requested that our engineers go back into the building on that date and make another inspection to see what had happened. I also requested that each tenant that felt there was something wrong that had gone to Mr. Rause to have something fixed and had not been fixed, send me a letter to that effect, which they did.

From those letters it would indicate nothing had been done.

Q In effect, you solicited complaints from sub-tenants - -

THE REFEREE: No, he asked them what was going on.

MR. SANDLER: I will ask the Court to take judicial notice of that.

Q And, it was based on this inspection on August 9th that the repairs were subsequently made, that you testified to, that cost eighty-nine thousand dollars?

A Right.

MR. SANDLER: Mr. Abberley, can I see the termination notice.

Q Mr. Brydon, I show you the June 22nd, 1973 default notice sent by the landlord to Overmyer and I ask you if there is any reference in this letter to the need to make repairs?

A No, there is not.

Q I show the termination notice sent by the landlord to Overmyer, dated July 23rd, 1973, and ask you if there is any reference in there to a default by reason of repairs?

A No, there is not.

Q Both letters refer to a default in the payment of July rent, is that correct?

A That is correct. We didn't feel we needed more than one default to terminate our lease.

MR. SANDLER: No further questions.

MR. ABBERLEY: No further questions.

MR. LIFLAND: I have one or two, Judge.

RE-CROSS EXAMINATION BY MR. LIFLAND:

Q Mr. Brydon, are you aware under the Overmyer leases it was the obligation of the sub-tenants to make certain repairs in these buildings?

A I would have to review the Overmyer leases. I believe that's the case, yes.

Q It would also follow since you testified your leases were substantially the same as the Overmyer leases with the same sub-tenants, but that requirement would continue?

A That is correct.

Q Did you ask the sub-tenants to make the repairs to the building?

A My understanding is - -

Q Did you?

A Yes.

THE REFEREE: Let him answer.

A Our scope of repairs was only on the basic structure of the building - - the roof, the surroundings - -

THE REFEREE: Were these the responsibilities of the subs, to your knowledge?

THE WITNESS: No.

THE REFEREE: Did you understand them to be the responsibility of Overmyer under the main lease?

THE WITNESS: Yes, that is correct. The sub-tenants had the responsibility for

keeping their own areas - - this is my knowledge of it - - and the way we wrote it was if they did any damage, say, to a door or something like that, they would repair it.

If they left it dirty, they would be required to keep it clean when they left. It would be a state or organizational maintenance.

Q The responsibility to repair doors would be that of the tenants and not the owner of the property, and not Overmyer?

A Doors may have been a bad choice.

Q It's your choice. Did you ever ask the tenants to make any of these repairs which you made or to bear the responsibility for making those repairs?

A Once the building was in a reasonable state of repair, which it is now, and it was then, in December, anything after that time we notified them if they did any damage they would be expected to pay for the repairs.

THE REFEREE: Have we had a single case here where any sub was responsible for the roof or parking areas?

MR. LIFLAND: He hasn't testified to roof damage.

THE REFEREE: I am asking you if we had a single case here where any sub was responsible for structural defects, paving, bumpers, and so on? What is it you are trying to do?

MR. LIFLAND: I believe there was a case with bumpers, yes, sir.

THE REFEREE: Bumpers all around the building?

MR. SANDLER: The truck bays of a particular tenant.

THE REFEREE: I am not speaking to that. Is that it?

MR. SANDLER: Yes.

MR. ABBERLEY: Yes, Your Honor.

MR. SANDLER: I call Mr. Flanagan.

S A M U E L H. F L A N A G A N, having been duly sworn by Honorable Roy Babitt, was examined and testified as follows;

THE REFEREE: Give your full name and home address to the reporter, please.

THE WITNESS: Samuel H. Flanagan, 2 Chester Road, Darien, Connecticut.

DIRECT-EXAMINATION BY MR. SANDLER:

Q Mr. Flanagan, are you presently employed by the receiver?

A Yes, I am.

Q In what capacity?

A In the area of marketing and collection of rents.

Q Prior to your employment by the receiver, did you occupy a similar position with the debtor?

A Yes, I was Eastern divisional manager.

Q When you were working for the debtor, what area was under your direct supervision?

A Basically the East Coast.

Q Was the Richmond, Virginia area under your direct supervision?

A The Richmond, Virginia area has been under my supervision since I joined the company. I have been responsible for the happenings in Richmond for a little over nine years.

Q Richmond, directly?

A Yes.

Q Was Bill Rause the local resident manager for Overmyer directly under your supervision?

A Bill Rause was the Richmond, Virginia regional manager and had been for four years.

Q Do you know whether the Overmyer Company made repairs to the Richmond, Virginia warehouse subsequent to May of 1973?

A I don't have the files. I will give you my knowledge. A report was received and a request was made by the owner of the building, The Carpenter Company, and attached to the request was that that some repairs be made. It was a rather extensive report from an engineering firm, I believe, located in Richmond, a copy of which was received from wherever in the Overmyer organization had been transmitted to me from the construction & engineering department, requesting that I have the resident manager meet with the engineer, which he was requested to do, and he reported back to me with regard to his meeting.

Now, I cannot tell you for a fact that I know that they met at the premises because I wasn't in attendance, but it is my belief Bill Rause did meet with a representative of the engineering firm, they did talk about certain repairs that were needed, and after this meeting certain things did happen.

Having a limited amount of funds that

were being expended in the area of repairs and construction, the construction department deemed the repairs to the driveway of sufficient nature to bring into the City one of their people and rather extensive repairs were made to the driveway area at Richmond Number 1, along with several other properties that needed some attention in Richmond.

The total extent and total dollars I can't tell you, maybe Mr. Guy can.

Q Do you have any idea of the dollars?

A Something in excess of twenty thousand dollars in repair of the pavement of Richmond Number 1.

Q This was subsequent to May 1973?

A It was during the springtime of '73 which I would believe happened after May 9th.

In addition to this, Rause requested that he be permitted to utilize his own employees in the repair of the several doors in which he felt the company was at that point in time responsible for, and requested the tenants to repair the doors which they were responsible for. He also had met with some success in repairing as opposed to replacing the gutters on one of the other buildings, and he proposed a

program whereby he would institute a repair of the flashings and gutters utilizing his own people.

Some work in this area was done. To what extent without consulting with Mr. Rause, I am not in a position to tell you.

In regard to his meeting the engineers, I understand there were a number of recommendations that the engineers made that were not in accordance with bringing the property or the repair of the property up, but enhancing it.

THE REFEREE: I think I have the flavor of this.

A The skylights of the entire back end of the property had been repaired. The holes were caused by youngsters throwing rocks through them, so we were told, and it was deemed if something were placed over them, it would be deemed that would be a proper repair.

MR. SANDLER: Thank you.

MR. ABBERLEY: No further questions.

MR. SANDLER: I rest.

THE REFEREE: Now, we are done with the landlord's case?

MR. SANDLER: Yes.

THE REFEREE: Thank you, gentlemen.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

In the Matter
of
D. H. OVERMYER COMPANY, INC.
(OHIO),

Debtor.

No. 73 B 1129

United States Court House
Foley Square, New York, N.Y.

April 18, 1974
3:00 o'clock p.m.

LANDLORD'S MOTION FOR POSSESSION (ST. LOUIS 2 AND 3 - ARUTT, NACHAMIE, BENJAMIN & RUBIN)

Before:

HON. ROY BABITT, Referee In Bankruptcy

BARRY W. RAYVID
Official Court Reporter
U.S. Courthouse (R. 230)
Foley Square, New York, N.Y. 10007

APPEARANCES:

ARUTT, NACHAMIE, BENJAMIN & RUBIN, ESQS.
Attorneys for the Applicant
11 West 42nd Street
New York, New York

BY: WILLIAM S. KAYE, ESQ., Of Counsel

BOOTH, LIPTON & LIPTON, ESQS.
Attorneys for the Receiver
292 Madison Avenue
New York, New York

BY: WILL B. SANDLER, ESQ., Of Counsel

LEVY, LEVY & RUBACK, ESQS.
Attorneys for the Debtor
225 Broadway
New York, New York

BY: BERTRAM R. LIFLAND, ESQ., Of Counsel

HOWARD R. SLATER, ESQ.
Co-Counsel for the Applicant
33 North LaSalle Street
Chicago, Illinois 60602

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PROCEEDINGS

MR. SANDLER: We are ready to proceed with the trial of St. Louis 2 and 3, Your Honor.

MR. SLATER: We would like to have a stipulation of fact if counsel for the receiver and debtor would agree.

THE REFEREE: Do I have a responsive pleading here?

MR. LIFLAND: Ours was handed up, Your Honor.

THE REFEREE: I have the receiver's and - -

MR. LIFLAND: Ours was handed up.

MR. KAYE: I have an amended application.

THE REFEREE: Do they get a chance to amend it?

MR. SANDLER: Our answer is directed to the amended application because we knew it was coming, and therefore, we held back.

THE REFEREE: I don't have your answer at all.

MR. KAYE: And, there is a reply. I didn't get a copy of the amended answer.

THE REFEREE: Do you understand your answer is the answer to the amended application?

MR. SANDLER: Yes.

MR. LIFLAND: The debtor adopts the receiver's answer.

MR. SANDLER: What would you like to stipulate?

MR. SLATER: If Your Honor please, there are two leases for two buildings here. We would like to stipulate as to those two leases.

Item 2, we didn't sought notices of default for failure to pay rent in 1973. We would like to stipulate that the notice was in accordance with Paragraph 15 of those two leases and they were duly received.

We would further like to stipulate no payment of rent was made within the time required by the lease after the default.

We would further like to stipulate subsequent thereto, a notice to terminate in accordance with Paragraph 15.02 was served, not only upon the debtor in this case, but the guarantors and certain subtenants.

THE REFEREE: What was the gravament of that?

MR. SLATER: Failure to pay. The notice of default was affective at the end of July, 1973. Subsequent to that, they made no effort whatever to cure it.

MR. SANDLER: Wait a minute, I am going to object to this because Mr. Slater is not stipulating.

MR. SLATER: I don't want to get into an argument. Subsequent thereto we filed an ouster proceeding and unlawful detainer in the city, the City of St. Louis, Missouri.

In addition thereto, we filed a proceeding in the United States District Court in St. Louis, which called for a money judgment against certain parties including the debtor herein.

That was the state of facts when the Court issued its stay order and all proceedings were stayed. We would like the Court, as a matter of the stipulation, to agree we have complied with all of the provisions of the lease and we were legally proceeding to get a judgment in place of what we already received - -

MR. SANDLER: It's not a stipulation, it's a request for a ruling in favor of the landlord. We will agree to stipulate that - - we will not agree to the legal conclusions. That's for the Court. I am not going to stipulate against myself.

THE REFEREE: All you can really stipulate is that steps were taken by the landlord in keeping with what it thinks the lease required. I will decide whether there has been compliance and what the legal impact is.

MR. KAYE: You have agreed to stipulate to the notice of default and termination, that they were duly served?

MR. SANDLER: I will stipulate that the notice is annexed to your amended complaint were duly served and received. I will not call them anything but letters dated May 31st, 1973 and June 27th, 1973.

MR. SLATER: Will you stipulate that the June 27th, 1973 letter was received June 29th, 1973?

MR. SANDLER: Yes.

MR. SLATER: Will you stipulate further

in the contents of that letter it requires that possession be delivered on or before - -

MR. SANDLER: No, I won't. The letter speaks for itself.

MR. KAYE: Will you also stipulate that an action was, in fact, commenced in the St. Louis Court to recover possession for unlawful detainer?

MR. SLATER: That was in the Magistrate Court in the City of St. Louis, State of Missouri, Number 71899, David Spatz versus D. H. OVermyer Company, Inc., a Missouri corporation - -

MR. SANDLER: Was an answer filed?

MR. SLATER: The defendant was represented by local counsel.

MR. SANDLER: Can I see a copy of the answer?

MR. SLATER: I don't know that we have a copy of the answer.

MR. KAYE: I have a copy of the answer.

MR. SANDLER: I believe we can stipulate that the action was commenced and that the defendant appeared by counsel and generally

denied all the allegations in the complaint in that particular action.

Any other stipulation?

MR. SLATER: What about payment of rent? Will you stipulate to the non-payment of rent from a particular date?

MR. SANDLER: What date are you claiming?

MR. SLATER: We are claiming February of 1973 down to and including the date hereof.

THE REFEREE: You have not been paid since February of 1973?

MR. SLATER: That is correct, Your Honor.

THE REFEREE: And have not been paid taxes?

MR. SLATER: That is correct, Your Honor.

MR. KAYE: There were several payments made of use and occupation.

MR. SLATER: That is also correct, sir. We had received two or three for use and occupancy.

THE REFEREE: The point is from

February of 1973 until the filing of the petition - -

MR. KAYE: There was no rent paid.

THE REFEREE: The amount of the arrearages total what?

MR. SLATER: Approximately one hundred forty thousand dollars including taxes.

THE REFEREE: Including taxes?

MR. SLATER: I could be wrong; it could be higher.

MR. SANDLER: What are the taxes?

MR. SLATER: Taxes are approximately twenty-four thousand dollars a year. We have not been paid since February of 1973 and taxes for February, 1973 and 1974 have been paid by the owner of the property.

In the meantime, in order to sustain our mortgage, we have borrowed one hundred thousand dollars at an interest rate of four points over prime.

MR. KAYE: Will you stipulate the fact that no rent was paid between February, 1973 and November 16, 1973, the date of the filing here?

MR. SANDLER: I note from your letter the rent for one building is twenty-six hundred dollars and the rent for the other is twenty-two hundred dollars?

MR. SLATER: That is correct.

MR. SANDLER: We will so stipulate.

THE REFEREE: Do you think that's so much of imputing the landlord as Judge Briant called it in Unishops?

MR. SANDLER: The truth is the truth if the rent is unpaid.

THE REFEREE: Do you think this is Queens Boulevard Liquor?

MR. SANDLER: I think the remedies are stronger - - going away from the individual case, the equities are far stronger to the landlord in this case than in Queens Boulevard Liquor. A liquor store could be run from any one of one hundred different premises.

Here if the business has subtentants and you lose the subtenants' leases, you are out of business.

MR. KAYE: Will you stipulate there is a sublease between Overmyer and Continental

Can Company?

MR. SANDLER: I will stipulate we have a sublease between Overmyer and Servicecenter, Inc. and pay monthly installments of eleven thousand five hundred eighty-four dollars. I will exhibit to you a copy of the lease and we will mark it as an exhibit.

MR. SLATER: With regard to that particular paper, I will stipulate this particular paper purports what you claim it to be.

I want to bring to the attention of the Court the following:

This was signed, as I see it, on March 15th, 1974 while these proceedings were pending.

MR. SANDLER: We signed deals yesterday, too. We are trying to sign one today.

MR. KAYE: Will you stipulate as of November 16th, 1973, that - -

MR. SLATER: There was no sublease other than those we terminated lawfully?

MR. KAYE: Will you stipulate as of November 16th, 1973, there was a sublease between D. H. Overmyer and Continental Can Company?

MR. SLATER: It was D. H. Overmyer Company, a Missouri corporation, a direct tenant of David Spatz that in turn, in 1966, entered into a lease, in 1966, with Service-center. When we purchased the property we took it subject to that state of facts?

Our lease likewise, states that no additional subleases will be entered into unless they are presented to the landlord, whose consents must be obtained, which would not be unreasonably withheld. The lease which was signed in March, 1974, to which the receiver's counsel makes reference was not brought to our attention and we did not consent.

We would like the record to show such, that Servicecenter, Inc. is a pocketbook corporation for Mr. Overmyer.

I will say for the record Mr. Overmyer is not a tenant and we don't want him there. We will not rest until we boot him out of there. That's the position of the landlord. I didn't come from Chicago to agree to anything less.

THE REFEREE: This sublease is with

who?

MR. SLATER: Servicecenter, Inc., Your Honor.

THE REFEREE: Is that a sub of Overmyer?

MR. SLATER: It is signed by Dan Overmyer. I will show it to you immediately.

MR. LIFLAND: I believe Mr. Overmyer has an interest in it.

MR. SLATER: Like one hundred percent?

MR. LIFLAND: I won't stipulate to that, sir.

MR. KAYE: We are not asking you to stipulate to that, Mr. Lifland.

THE REFEREE: If. D. H. Overmyer Company is, how does this debtor get involved, then?

MR. SANDLER: The debtor is not involved.

MR. LIFLAND: This is a third party. It has nothing to do with Overmyer.

THE REFEREE: The debtor subleased to another company. Is that the sublease?

MR. LIFLAND: That is the sublease, Your Honor, yes.

THE REFEREE: Who held the sublease

before the March, 1974 sublease?

MR. SLATER: Continental Can Company through Servicecenter.

Servicecenter's sublease was terminated in July of 1973. They are not a party to this reorganization proceeding and the stay order of this Court does not protect them.

They cannot hide behind the stay order which affects D. H. Overmyer Company, a Missouri corporation. Nevertheless, counsel in St. Louis represented to the Court this Court's stay order stops all proceedings in St. Louis, including our right to ouster Servicecenter, Inc.

Quite clearly this was a misstatement and we want it rectified. This stay does not cover Servicecenter, Inc.

THE REFEREE: Who are the parties with Spatz?

MR. SLATER: D. H. Overmyer Company, a Missouri corporation.

MR. KAYE: There is a lease dated March 15th, 1967, between David Spatz and D. H. Overmyer Company, a Missouri corporation, which lease commenced March 15th, 1967, and

expires March 14th, 1992.

MR. SANDLER: Are there any renewal options?

MR. SLATER: Yes, four five-year renewal options.

MR. SANDLER: Does the rent go down?

MR. SLATER: Only in the fourth five-year period.

THE REFEREE: I still don't understand this other company. There is one sublessee?

MR. SLATER: Your Honor, at the time we entered into the lease - - the lease reads as follows - -

MR. KAYE: There is a copy of the lease attached to the amended application.

MR. SLATER: If the Court will turn to Page 1 of the lease, Your Honor, the very full last paragraph and witness to the paragraph - -

THE REFEREE: I see that.

MR. SLATER: That was what we took subject to. However, I am now led to believe that the lease between Servicecenter and D. H. Overmyer Company, a Missouri corporation,

apparently was renewed and there was a brand new lease entered into March 15th, 1974.

We were never served with a copy thereof and, in any event, Servicecenter's right to possession was legally terminated July, 1973. They were not protected by any order of this Court in any shape or form.

MR. SANDLER: If Your Honor please, whether or not Servicecenter's right was terminated because they purportedto terminate without any additional proceeding is not what is at issue in this case.

I think what is emerging is that Servicecenter emerged from this building after this landlord bought the property and leased it back to Overmyer. This was not a brand new tenant created for this proceeding. This tenant has been there from day one. We are prepared to proceed now with testimony. Whether or not the lease was terminated is the issue before this Court. Counsel is taking the position because they sent a letter back in May, the lease is terminated.

There was never a State Court proceeding

or Federal Court proceeding that went to conclusion. We would now like to proceed in a more traditional manner.

Mr. Slater may go under oath if he is a principal in this deal.

MR. SLATER: I am. I want the Court to be advised I not only proceed as attorney but as a principal.

MR. KAYE: We have a memorandum of law to submit at the conclusion. Under Missouri Law no termination is necessary once there is a notice of termination pursuant to the lease.

We will sufficiently brief that at the time. May I call Mr. Slater to the stand?

THE REFEREE: I want all this evidence in the record, about the leases.

H O W A R D R. S L A T E R, having been duly sworn by Honorable Roy Babitt, was examined and testified as follows:

THE REFEREE: Please give your full name and home address to the reporter.

THE WITNESS: Howard R. Slater, 120

South Deer Park Drive, Highland Park, Illinois.

DIRECT-EXAMINATION BY MR. KAYE:

Q Mr. Slater, are you an attorney duly admitted to practice law in the State of Illinois?

A I am; also in the State of New York, since 1940.

Q In such capacity do you represent David Spatz, the landlord herein and applicant?

A I do.

Q In addition to representing Mr. Spatz as legal counsel, do you hold an interest in the building known herein as St. Louis 2 and 3?

A I do. I approximately own eight percent.

Q Are you completely familiar with - - from your own personal knowledge - - with the operations of this building and the partnership that owns it?

A I am.

Q Are you familiar with the various contracts, leases and other agreements that exist in connection with this building?

A I am.

Q I call your attention to the lease dated

March 15th, 1967 between David Spatz and D. H. Overmyer Company, Inc. for the premises in question.

Are you familiar with that lease?

A I am, sir.

Q Can you tell us under what circumstances this lease was entered into?

A At the time that we negotiated for the purchase of the property the owner thereof was D. H. Overmyer Company, Inc., a Missouri corporation. They were then and exhibited to us existing leaseholds, one between The Overmyer Company, Missouri and a company called Servicecenter, Inc., likewise a Missouri corporation, which, in turn, had subleases, one a major one with Continental Can Company, a New York corporation, and two other additional subleases with two companies whose names I no longer recall.

The record should show that those additional subleases ran their course and the tenants are no longer in the premises. After we purchased the property we leased it back to The Overmyer Company, Missouri, under a net-net lease.

There was a separate lease for St. Louis Number 2 and a separate lease for St. Louis Number 3. The net rental from the two properties to-

gether is seventy-nine hundred thirty-two dollars per month in addition to which the lessee was to pay all real estate taxes and absolutely all costs of maintenance and operations of whatever nature. That is the meaning of the so-called net-net lease.

We were advised at that time that Servicecenter, Inc. was a corporation that was part of the Overmyer family. We were given their address as 42nd Street and Third Avenue, the same address of the then Overmyer operation.

We were told that Servicecenter, Inc. was primarily in the business of servicing warehouses, operating fork lift trucks and actually functioning as an adjunct of Continental Can Company which uses the warehouses to store on a pallet, huge amounts of equipment and other materials.

Under the terms of that lease the landlord was to be advised and served with notice of any additional new subtenants. I state unequivocably we have never been served with any notice of any new subleases by Servicecenter or D. H. Overmyer Company of anyone. Back in February of 1973, Missouri which was the tenant under the lease, stopped paying its rent. We served a notice of default which has not been

stipulated into the record. I think it's the letter dated May - -

Q May 31st, 1973?

A May I have the letter?

THE REFEREE: That's Exhibit "A" annexed to the amended application, I take it?

MR. KAYE: That is correct.

A That is right, Your Honor. That letter was written on my legal letterhead and sent out registered mail return receipt requested.

I have in my possession, in my files, the certificate indicating receipt on June 2nd by D. H. Overmyer Company, a Missouri corporation.

Q Excuse me, Mr. Slater - -

A It's been deliberate. We asked for payment at that time of a sum of approximately forty-three thousand dollars consisting of twenty-one thousand seven hundred dollars of unpaid rent, and unpaid real estate taxes of approximately twelve thousand dollars. Not a dime of it was paid.

We waited the ten-day period required by the leases. We called and were given all kinds of reasons why it couldn't be paid. We waited a reasonable period of time and pursuant to Paragraph 15 of the

lease we sent them a notice of termination for default.

Q Does that appear as Exhibit "B"?

A That is Exhibit "B" in the amended application. It was sent to the party in question return receipt requested. It was sent on June 27th and received on June 29th, and that notice says "That your rights to the lease are terminated on July 31st."

The lease requires that they be given a thirty-day period to vacate after the notice of termination. This in affect, gave them more.

Q Subsequent to the mailing of the notice of default and the notice of termination, were you or Mr. Spatz ever contacted by any representative of D. H. Overmyer Company with a view towards curing the defaults?

A Yes.

Q What was the substance of the conversation?

A They sent a young attorney and a property manager to Chicago. The substance was would I accept a one or two-month payment and simply delay the ouster proceeding. We filed almost immediately, in August of 1973, two lawsuits, one in the Magistrate Court in the City of St. Louis for unlawful detainer,

and one in the United States District Court for the collection of a money judgment representing the unpaid rent.

Q Did, in fact, you accept any payment from them?

A Yes, I think they paid us two months' rent of approximately seventeen thousand dollars which was accepted under the terms of the stipulation that this was not intended to cure the defaults but merely to gain them a delay in the trial of the trial of the proceeding then pending in St. Louis.

Q Were those proceedings delayed?

A They were. Mr. Barkin, our St. Louis counsel, under my instructions proceeded to give them a continuance for forty-five days.

Q Did that period overlap November 16th, 1973?

A It sure did.

Q Subsequently were you and Mr. Spatz served with an order of this Court staying the proceedings?

A Sometime in the month of December we were served with a copy of the order of this Court staying all proceedings against this debtor but not as

against Servicecenter.

Q As of November 16th, 1973 had the defaults in the lease been cured by D. H. Overmyer?

A No, sir, nor was there any way they could possibly cure other than by payment of one hundred percent of the default plus payment of the legal fees. No amount was tendered.

Q Was there ever a stipulation entered into that removed the default?

A No, sir. On the contrary. The stipulation that cures the default specifically states "This is not to cure the default but merely to continue the proceedings."

Q Mr. Slater, are you familiar with the gross amount that is paid to Mr. Spatz by D. H. Overmyer for a year?

A On a yearly basis, yes, sir.

Q What is that amount?

A It is one hundred twenty-one thousand dollars, approximately.

MR. KAYE: Your Honor, I would respectfully submit in addition to that amount the twenty thousand dollar figure you fixed per building must be added. Actually, we could say

there should be more. This is a one hundred sixty thousand square foot building.

THE WITNESS: These are two buildings, one of one hundred twenty thousand feet and one of forty thousand feet.

MR. SANDLER: How do you break that down.

A Number 2 pays fifty-six hundred seventy-three dollars per month; number 3 pays twenty-three hundred fifty-nine dollars per month. The two together pay seventy-nine hundred thirty-two dollars per month.

In addition to that, there are real estate tax payments of twenty-one hundred thirty-seven dollars a month. And, I have been advised by Mr. Booth that the receiver is actually reserving that twenty-one hundred thirty-seven dollars right now.

If you add the twenty-one hundred thirty-seven dollars to the seventy-nine hundred thirty-two dollars, you come to ten thousand sixty-nine dollars per month which is what we are supposed to get, or approximately one hundred twenty-one thousand dollars per annum.

Now, this is an absolutely net obligation and it makes no provision whatsoever for insurance

or property repairs, and maintenance or deferred repairs and maintenance.

MR. KAYE: I would respectfully submit on the basis of twenty thousand dollars for a one hundred twenty thousand foot building, there must be an additional, approximately, one-third or eight thousand dollars added for the other forty thousand feet.

THE REFEREE: That's seven thousand dollars.

MR. KAYE: Excuse me, seven thousand dollars, which would make it twenty-seven thousand dollars in addition to the one hundred twenty thousand dollars which would mean this building costs D. H. Overmyer one hundred forty-seven thousand dollars per year.

THE REFEREE: What is its yield?

MR. KAYE: I don't think Mr. Slater can testify to that.

A I did look at the exhibit which Mr. Sandler submitted. As of March 15th, 1974, Service-center, Inc. agreed to pay one hundred thirty-nine thousand dollars per annum. May we have a copy of that?

MR. SANDLER: What?

THE REFEREE: Is there any relation to their relying on the bankruptcy clause?

THE WITNESS: We were relying on the terms in the lease itself months before the proceedings were instituted.

THE REFEREE: You could assert a ground of termination under the bankruptcy clause.

THE WITNESS: We claim it is already terminated. Why go through it twice? See, we have the bankruptcy clause - -

MR. KAYE: Your Honor, I think it's more analagous to a secured creditor seeking to recover its security on which it has a lien than what Mr. Sandler and Mr. Booth are asserting as an equitable defense where you have a company in Chapter XI whose prinicipal operation is located in the premises and if the Court ousts them from the premises, they have no possibility of operating.

THE REFEREE: I am aware of the implications of Lane Foods and the difference between that restaurant and Judge Judd's liquor store.

MR. KAYE: I have no further questions of Mr. Slater.

MR. SANDLER: Can I have a copy of the lease, please.

CROSS-EXAMINATION BY MR. SANDLER:

Q Mr. Slater, if I understand your testimony, and you correct me, you stated when the seventeen thousand dollars was paid sometime prior to November 16th, that did not cure the default because the only way to cure the default was to pay one hundred percent of the entire default plus the interest and counsel fees and whatever other costs were involved?

A May I add to that?

Q Was that your testimony?

A No, my testimony is to this affect, there is no way to cure a default if I refuse to accept it as such.

We had terminated the lease and we were not going to reinstate it under any circumstances. We told this to Overmyer and they said please, don't oust us, give us an opportunity to work out our situation. We said all right, but I want you to understand we will not reinstate you as tenant under any condition our acceptance is as to buying you time only in court.

Q They just made a gift of seventeen thousand dollars?

A No, they owed us money.

Q You said you accepted that seventeen thousand dollars pursuant to a stipulation?

A Yes, sir.

Q Where is the stipulation? Mr. Slater, I refer you to the stipulation of October 19th, 1973.

A Yes, sir.

Q Was that the stipulation you had in mind?

A No, it's not, but go ahead.

Q Pursuant to that stipulation Spatz, as landlord, Overmyer as prime tenant, and I guess Servicecenter as the first subtenant, and Continental Can, party of the third part and the final subtenant, seventy-five thousand dollars which would have been from Continental to Servicecenter, and to Overmyer, was stipulated and agreed to be paid by Continental to Spatz by Servicecenter.

Are you familiar with that?

A It's not what you say it to be. The payment of seventy-five thousand dollars actually was arrived at between Continental and Spatz and doesn't

represent money.

Q Did Spatz have a contracural relationship with Continental Can?

A No, sir. We had a right to possession of the premises.

Q If you are going to make speeches, we will be here a long time, because I will oblige you.

The seventy-five thousand dollars that is the subject of this stipulation - - Mr. Slater, let me finish. I can't finish a question.

THE REFEREE: What is the difference?

MR. SANDLER: They collected seventy-five thousand dollars.

THE REFEREE: Seventy-four thousand one hundred eighty-eight dollars and sixty-five cents?

MR. SANDLER: Yes, sir.

Q This represents money which would have been paid from Continental to Servicecenter, then turned over to Overmyer, and then from Overmyer to Spatz, is that correct?

A In part. It's not altogether correct.

Q What part is not correct?

A Part of it represents an attempt on our

part to collect from Continental representing unpaid real estate taxes which is nothing to do with their obligation. If they paid what they owed, they would have paid something less than that.

Q You mean that Continental was paying more than its lease rent to Servicecenter?

A At that point in time, yes, that is correct.

Q But, nevertheless, it was understood to the extent it was paying to you what it would have paid to Servicecenter or to Overmyer that this, in affect, represented a payment for Overmyer by Continental Can, is that correct?

A Your Honor, we have had some conversations about so-called legal conclusions. Are you asking for a legal conclusion?

Q I am asking for the basis upon which - -

A I have already answered your question as to what this money represented. There was some part of it I am not sure of which I believe to have been rental from Continental to Servicecenter.

There was an additional amount which was unpaid real estate taxes which had to be paid then

and there. We got Continental Can to put up the money even though they didn't necessarily owe it. May I finish?

THE REFEREE: You brought it out.

MR. SANDLER: I am very happy with it, Judge.

A (Continuing) It was - - the obligation of Missouri at that point in time was well in excess of the number involved without adding interest and legal fees.

Q Mr. Slater, originally I was trying to find that stipulation that referred to the seventeen thousand dollars?

A That's merged into this.

Q Is there a reference in this to the seventeen thousand dollars?

A It's all part of this total package.

Q When was the seventeen thousand dollars paid?

A In February or March, and it referred to November, December and January rentals which was prior to this notice of default. They had been in default repeatedly.

Q You said the seventeen thousand dollars

was paid in February or March?

A Of '73, but it applied to months not involved in this proceeding.

Q This stipulation is dated October 19th, 1973?

A Correct.

Q Did you receive the seventy-four thousand one hundred ninety-eight dollars?

A Less the numbers involved. If you will read on, you will see there are certain deductions for - -

MR. SANDLER: I would like to mark the October 19th, 1973 stipulation as Receiver's Exhibit "1" in evidence.

(At this time, the said document was marked in evidence.)

Q Mr. Slater, if the receiver were to today tender to you all of the arrears, interest and legal fees in order to cure all pre-petition defaults, would you accept the check?

A No, sir. May I answer the question?

Q You answered me.

THE REFEREE: I will ask why?

THE WITNESS: If Your Honor please, we have had three years of a series of defaults

from the same source. We have no reason to believe that the source once reinstated as the debtor in possession, will do any better in the future than he did in the past. That's why.

We are sick and tired of sending out notices of default. Although they are not before this Court, I must have sent out six or eight defaults and had some six or seven occasions to have conversations with New York, where they said don't go ahead, we will pay you the rent, and immediately thereafter they go back into default until my client and I lose patience.

If I listen to this kind of stuff anymore, I will probably go down the tube with Overmyer.

Q Mr. Slater, what were the original terms of this lease?

A Twenty-five years.

Q I believe you said there were four ten-year renewals?

A Options.

Q I am looking at the lease and it says

"Ten years"?

A The exhibit speaks for itself. I stand corrected.

Q Four ten years?

A Yes.

Q The lease commenced in 1967, so there are eighteen years left on the original terms plus forty years on renewal options, so it's fifty-eight years?

A You have sixteen years left.

Q So it's fifty-six years. The rent payable to yourself stays the same for that fifty-six year term except for the fact it reduces towards the end?

A Whatever the clause states.

Q You are familiar with it?

A I wrote it. I don't remember the reduction part.

Q Do you feel your property has greater value without the Overmyer lease?

A I haven't the foggiest notion. Continental Can has a lease that expires at the end of the year.

Q That was not my question.

A I am answering as best I know.

THE REFEREE: Let him go.

A Continental Can says unless this matter is determined legally, they want to move out; they don't want to have any responsibility. Over ten years we may recover our expenses, the amount we lost with respect to these proceedings.

We didn't go into this deal with Overmyer to try and take something from him. On the other hand, we didn't enter into it to lose our shirts. Our concept of a sale and leaseback, which is what this is, is we were in the position of a mortgagee. If you will read the literature sale and leaseback is probably referred to as a second lease where the landlord is in the position of a second mortgagee and the security is a lien - -

Q Mr. Slater, in analogizing this to the position of a mortgagee, if there is a default under a mortgage, can the mortgagee foreclose?

A Yes, sir.

Q In affect, that is what is happening here, is it not, if you are in the position of a mortgagee?

A Basically.

Q What was the actual amount you invested?

A Two hundred fifty thousand dollars, approximately, plus legal fees.

Q If you were a mortgagee it would have been a two hundred fifty thousand dollar mortgage, is that correct?

A Correct.

Q On a foreclosure, if four hundred thousand dollars was bid and received, how much of the four hundred thousand dollars would you be entitled to as a mortgagee?

A Do you want the law on that?

Q Yes.

A All my interests and earnings, and all the things I am entitled to, including tax benefits, and any repayments on the first mortgage which accrue is what I would be entitled to - -

Q Just a minute, sir. You refuse to answer a single question because it's not convenient for you to do so. If your loan is two hundred fifty thousand dollars on a foreclosure you are entitled to your loan plus interest and - -

A Not in the sale and leaseback.

Q I am talking about a mortgage. Your

analogy is not for a mortgage.

A I am only to the extent we are entitled to to reach for the security.

THE REFEREE: Tell me what it is under Illinois Law?

THE WITNESS: It is Missouri.

THE REFEREE: What is the impact of a Missouri foreclosure under this kind of arrangement? In other words, you equated it with a mortgage because you said you can go after the security?

THE WITNESS: Correct, sir.

THE REFEREE: Under a leaseback like this?

THE WITNESS: That is correct, sir.

THE REFEREE: What else were you talking about?

THE WITNESS: Let us suppose for the sake of argument we are to be paid in full, we are being paid in full for our contract.

THE REFEREE: What does thatmean besides the value?

THE WITNESS: The repayment value on the payoff of the first mortgage, we would have

received had the terms of the lease been abided to and held. We are paying off about seven hundred thousand dollars or eight hundred thousand dollars of the first mortgage with the rent proceeds and at the end of twenty-five years, you own the property free and clear of the first mortgage.

You haven't gotten a yield on your two hundred fifty thousand dollars in terms of dollars and cents that you have accrued the bricks which you own. At the next point in time, if you get the full rent and the rent happens to be ninety-six thousand dollars a year, we are going to get a ninety-six thousand dollar net yield on a two hundred fifty thousand dollar investment where previously you got a twenty-four thousand dollar net yield on a two hundred fifty thousand dollar net investment.

THE REFEREE: You are suggesting in the event of a foreclosure here there is no such thing as equity?

THE WITNESS: No, he gets wiped out, absolutely wiped out. All he has is the right

to make use of the property.

THE REFEREE: Unlike a typical mortgage, and I am not even sure I understand real estate law - - unlike a typical mortgage where the mortgagor is entitled to the equity of above the foreclosing - - in this type of situation, a leaseback situation, there is even less likelihood a mortgagor will see anything?

THE WITNESS: That is correct. There is a reason for it.

THE REFEREE: Did you know all this, Mr. Sandler?

MR. SANDLER: Did I know it? - - I don't think there is any basis for what Mr. Slater is saying. I would like to see one case - -

THE REFEREE: I have testimony under oath from a man who is a member of the Bar who sounds more knowledgeable than I am.

MR. SANDLER: I didn't bring up sale leasebacks being equitable because you didn't allow me to. If you put yourself in the position of the mortgagee you are entitled to the

face amount of the note, any interest, and legal fees, and the excess goes to the underlying owner.

THE REFEREE: Apparently, Mr. Sandler, there is an equitable mortgage question and undisputed testimony only to the extent you can go after the physical property as in a mortgage foreclosure.

But, he is saying that the only point of identity with the mortgage because when you have got this kind of foreclosure sale leaseback, there is much more increment than in the typical mortgage foreclosure.

MR. SANDLER: I heard, Your Honor.

THE REFEREE: Okay.

MR. SANDLER: It's the position of the receiver's counsel if this were equated to a mortgage, the foreclosing mortgagee would be entitled to his two hundred fifty thousand dollars. I have undisputed testimony now so why should the Court treat it as an equitable mortgage; why not treat it in light of what it really is, a sale leaseback?

Why should I contort myself to call it

an equitable mortgage for one purpose and not look to it for what it is according to this testimony. According to this testimony, one hundred thousand dollars was paid and received by this landlord after a default was declared.

THE REFEREE: Let's go.

Q Would you accept from the receiver the original cash investment that you paid for this property, which is two hundred fifty thousand dollars, all your arrears, your interest and your legal fees?

A No, sir.

Q Why not?

A Two hundred fifty thousand dollars in 1967 had purchasing power (A) Worth a lot more than two hundred fifty thousand dollars in 1974; (B) Two hundred fifty thousand dollars was invested in 1967 subsequent to a mortgage of seven hundred thousand dollars which has substantially paid down, I believe, to a little over half a million dollars.

My equity, at least as a matter of law, has now risen to four hundred fifty thousand dollars and on an actual physical basis, it's higher. If you are asking me to forego my profit, you are wrong.

Q When you say "physical basis," you are

talking about replacement value?

A Market value.

Q And, would you say the market value has grown?

A I have no idea - - more than I paid for it?

Q Would you say it's ten dollars a foot?

A I have no idea.

THE REFEREE: In any event, Mr. Overmyer would never own it. All he has is the right to rent it.

MR. SANDLER: That is true.

THE REFEREE: Mr. Overmyer doesn't own it in fee?

MR. SANDLER: We have all of the incidents of ownership for the next fifty-six years for which we pay a flat rent.

No further questions.

MR. KAYE: No other questions of Mr. Slater.

Your Honor, I would respectfully submit we - - on behalf of the applicant - - that this lease was terminated pursuant to the lease.

THE REFEREE: Are you making a motion for

judgment?

MR. KAYE: Was terminated pursuant to the lease in June of 1967 some five months prior to the filing of the petition herein; that the only proceedings that were initiated under Missouri Law were for unlawful detainer to recover physical possession; as of July 31st, 1973, the debtor herein had no interest, property or rights under said lease and that, therefore, this Court should vacate the stay and allow the applicant to recover his premises or, in the alternative, declare the state of facts that the lease is terminated as of July 31st and that the applicant has the right to immediate possession.

THE REFEREE: Decision reserved.

S A M U E L H. F L A N A G A N, having been duly sworn by Honorable Roy Babitt, was examined and testified as follows:

THE REFEREE: Please give your full name and home address to the reporter.

THE WITNESS: Samuel H. Flanagan, 2

Chester Road, Darien, Connecticut.

DIRECT-EXAMINATION BY MR. SANDLER:

Q Mr. Flanagan - -

THE REFEREE: What is the rent roll here?

THE WITNESS: Eleven thousand five hundred eighty-four dollars per month, and Servicecenter, Inc. is responsible for all maintenance and insurance.

THE REFEREE: How much is that?

THE WITNESS: Eleven thousand five hundred eighty-four dollars plus insurance premiums and all maintenance.

Q The difference per month, Mr. Flanagan, is how much?

A Fifteen hundred fifteen dollars or eighteen thousand dollars a year.

MR. SANDLER: If Your Honor please, I would like to point out to the Court you were here when Mr. Brand testified - -

MR. KAYE: In part.

MR. SANDLER: This is a net lease as regards this building. You would not have

maintenance, insurance, and not have a property manager.

THE REFEREE: But, you have the New York operation?

MR. SANDLER: You have the New York operation.

THE REFEREE: About sixteen thousand dollars or eighteen thousand dollars a year?

MR. SANDLER: But, we also have and I am very happy to adopt as my testimony, Mr. Slater's value of this property - -

THE REFEREE: You don't own it.

MR. SANDLER: We own it for the - - the lease is in full force and affect and we have it for fifty- ix years.

THE REFEREE: What does that mean? I haven't heard a word about what kind of tenant he can get and what the market is in that area.

Q Do you know who Servicecenter has sub-leased this warehouse to at the present time?

A It is my understanding Continental Can is there as their largest subtenant.

Q Do you know how long Continental Can

has been in that building?

MR. KAYE: Your Honor, I believe the witness is testifying from what he understands.

MR. SANDLER: I asked him, do you know?

MR. KAYE: He said he understands. I would respectfully object.

THE REFEREE: I don't think I need any testimony about the subtenancy of Continental Can.

Q Are you familiar with the rental market in St. Louis for warehouse space?

A I have no personal knowledge of it, no.

MR. SANDLER: No further questions.

MR. KAYE: I have no questions.

THE REFEREE: We don't need Mr. Guy, do we?

MR. SANDLER: Not on this one.

THE REFEREE: I don't know where it helps you, Mr. Sandler, to keep pressing the point that Overmyer is concerned with replacement. He is not the owner, he is not concerned with replacing. He is concerned with renting the space.

I have heard nothing about what tomorrow

may bring in East St. Louis.

Okay.

MR. KAYE: I would also remind you you have testimony from Mr. Slater that Continental Can advised him - -

THE REFEREE: He told me, I heard it. It was not lost.

MR. KAYE: I didn't think it was, Your Honor.

THE REFEREE: Decision reserved on this one.

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049

IN THE MAGISTRATE COURT OF THE CITY OF ST. LOUIS

STATE OF MISSOURI

DAVID SPATZ, Plaintiff, v. D. H. OVERMYER CO., INC., SERVICECENTER, INC. and CONTINENTAL CAN COMPANY, INC., Defendants.	)	Cause Nos. 71899 and 71900 Assignment Division

STIPULATION

It is hereby stipulated and agreed by and between DAVID SPATZ (hereinafter sometimes referred to as Party of the First Part), D. H. OVERMYER CO., INC., SERVICECENTER, INC. and OVERMYER DISTRIBUTION SERVICES, INC. (hereinafter sometimes referred to as Parties of the Second Part) and CONTINENTAL CAN COMPANY, INC. (hereinafter sometimes referred to as Party of the Third Part) who include all of the parties to the above-entitled actions:

1. Party of the Third Part is hereby authorized and directed by Parties of the Second Part to forthwith pay over to Party of the First Part on behalf of and for the account of Party of the Second Part the sum of Seventy-five Thousand Seven Hundred Twenty-one and 73/100 Dollars ($75,721.73) less $1,500.00 in attorney's fees and $23.08 cash outlays which sums are to be deducted and retained by Party of the Third Part. Parties of the Second Part further direct Party of the Third Part to issue a check made payable to "David Spatz" for said net sum of $74,198.65 and de-

RECEIVERS EX- 1 EFD. 4/18/74

liver the aforesaid check to his attorney, Bernard A. Barken.

2. The net sum of $74,198.65 is to be applied on account for rentals and other items, including but not limited to, attorney's fees, due or to become due Party of the First Part from Parties of the Second Part pursuant to certain leases dated March 15, 1967 for the premises more particularly described in the above entitled actions, or due or to become due pursuant to said actions. Party of the First Part agrees to furnish Parties of the Second Part, upon receipt of said sum of $74,198.65, the following receipt: "Received of D. H. Overmyer and Servicecenter, Inc. the sum of $74,198.65 per Stipulation dated October 18, 1973."

3. Upon Party of the First Part's receipt of the aforesaid amount, Party of the First Part shall pay to Laclede Bond and Mortgage Company the amount of $19,256.00 representing the March 1973 and September 1973 real estate tax escrow payments and will instruct Laclede Bond and Mortgage Company to provide D. H. Overmyer Co., Inc. with a receipt stating: "Received of David Spatz, on behalf of D. H. Overmyer Co., Inc. and Servicecenter, Inc. the amount of $19,256.00 representing the March 1973 and the September 1973 real estate tax escrow payments."

4. Party of the First Part's acceptance of the $74,198.65 shall be considered only as a credit upon any amounts which may be found to be due Party of the First Part by agreement of the parties under said leases and/or by reason of the occupancy of said premises by Parties of the Second Part or if no agreement is reached, then by final judgment in these proceedings.

5. Neither the payment of the said $74,198.65 by the

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Party of the Third Part, nor its acceptance by the Party of the First Part, nor this Stipulation shall constitute or be construed to be a waiver of the forfeiture and termination of said leases by Plaintiff or of any of the grounds alleged in said actions, nor as an agreement by Party of the First Part to dismiss the above-entitled actions as to any party nor shall such payment constitute an admission by Parties of the Second Part or Party of the Third Part of any liability arising out of said leases or premises.

6. Party of the First Part hereby agrees that the above causes shall be continued from and after October 19, 1973, until November 16, 1973 or the first available court date thereafter should the court refuse to set said case on November 16, 1973. Parties of the Second Part and Party of the Third Part agree that if this matter is not finally resolved by said last mentioned court date, they will not request a continuance, or request a jury trial or change of venue but shall agree to a trial on the merits on said date.

7. Conditioned upon the receipt by him of a check made payable to him in the amount of $74,198.65, Party of the First Part hereby for himself and for his successors and assigns does forever release, remise, acquit and discharge Party of the Third Part and its successors and assigns from any and all claims, demands, damages, liabilities, actions or causes of action up to the amount of said check which he may now have or which his successors or assigns hereafter may have or by any reason of any matter, cause, thing, occurrence or event whatever happening or accruing up to the date of these presents.

8. Conditioned upon the receipt by the Party of the First Part of a check made payable to him in the amount of $74,198.65, Parties of the Second Part hereby for themselves and for their successors and assigns do forever release, remise, acquit and discharge Party of the Third Part and its successors and assigns from any and all claims, demands, damages, liabilities, actions or causes of action up to the amount of said check which they may now have or which their successors or assigns hereafter may have or by any reason of any matter, cause, thing, occurrence or event whatever happening or accruing up to the date of these presents.

9. Parties of the Second Part consent to a deduction by the Party of the Third Part of the fees and expenses incurred by its attorneys. Upon satisfaction of the amount of its attorney's fee and expenses, the attorneys for Party of the Third Part agree to provide Parties of the Second Part with a statement of its attorney's fees and cash outlays indicating the receipt of payment therefor.

IN WITNESS WHEREOF, each of the parties have hereunto set their hands by and through their attorneys of record this 19th day of October, 1973.

D. H. OVERMYER CO., INC.
SERVICECENTER, INC.
OVERMYER DISTRIBUTION SERVICES, INC.

By Thomas E. Tuttle
Its Attorney

CONTINENTAL CAN COMPANY, INC.

By W. Hood Hicks
Its Attorney

DAVID SPATZ

By _____
His Attorney

STATE OF MISSOURI)
) ss.
CITY OF ST. LOUIS)

On this 18th day of October, 1973, before me appeared THOMAS E. TUETH, to me personally known, who being by me duly sworn did say that he is an attorney in the law firm of Lashly, Caruthers, Theis, Rava & Hamel, attorneys for D. H. Overmyer Co., Inc., Servicecenter, Inc. and Overmyer Distribution Services, Inc., and that he has signed this Stipulation on behalf of said corporations, that he has authority from said corporations to enter into this Stipulation and that said signature to the Stipulation is his free act and deed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal at St. Louis, Mo. the day and year first above written.

_____, Notary Public

My commission expires _____

Notary For The County Of St. Louis
My Commission Expires June 29, 1978

STATE OF MISSOURI)
) ss.
CITY OF ST. LOUIS)

On this 19th day of October, 1973, before me appeared W. DAVID WELLS, to me personally known, who being by me duly sworn did say that he is an attorney in the law firm of Thompson & Mitchell, attorneys for Continental Can Company, Inc., and that he has signed this Stipulation on behalf of said corporation, that he has authority from said corporation to enter into this Stipulation and that said signature to the Stipulation is his free act and deed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal at St. Louis, Missouri the day and year first above written.

_____, Notary Public

My commission expires July 10, 1975.

STATE OF MISSOURI)
) ss.
CITY OF ST. LOUIS)

On this 18th day of October, 1973, before me appeared BERNARD A. BARKEN, to me personally known, who being by me duly sworn did say that he is attorney for David Spatz, and that he has signed this Stipulation on behalf of said person, that he has authority from said person to enter into this Stipulation and that said signature to the Stipulation is his free act and deed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal at St. Louis, Mo. the day and year first above written.

Notary Public

My commission expires _____

Notary Public, City Of St. Louis
My Commission Expires Nov. 29, 1973

055

REXFORD H. CARUTHERS
C. KENNETH THIES
CHARLES T. DEE
PAUL B. RAVA
ELIHU M. HYNDMAN
WILLIAM I. RUTHERFORD
DALTON W. SCHREIBER
ALBERT HENRY HAMEL
MICHAEL C. WALTHER
WILLIAM E. BUCKLEY
ALBERT J. STEPHAN, JR.
JOHN FOX ARNOLD
RICHARD D. SCHREIBER
DAROLD E. CROTZER, JR.
STEPHEN K. LAMBRIGHT
CHARLES H. STEIB
THOMAS E. TUETH
WILLIAM JAMES O'HERIN
JAMES T. BARRY, JR.
ROBERT W. LOCKWOOD
THOMAS CUMMINGS

LASHLY, CARUTHERS, THIES, RAVA & HAMEL
LAWYERS

PAUL BROWN BUILDING
818 OLIVE STREET, SUITE 1300
ST. LOUIS, MISSOURI 63101
(314) 621-2939

ST. LOUIS COUNTY NATIONAL BANK BUILDING
11 SOUTH MERAMEC AVENUE, SUITE 810
CLAYTON, MISSOURI 63105
(314) 727-8281

HYNDMAN & RUTHERFORD
AND
KERTH, THIES, SCHREIBER, HAMEL & DEE

JACOB MARK LASHLY
(1882-1967)

ARTHUR V. LASHLY
(1880-1957)

ALFRED H. KERTH
OLIVER J. MILLER
COUNSEL

July 3, 1974

REPLY TO St. Louis Office

Mr. Edward Connery
Attorney at Law
Suite 1100
29 W. 34th Street
New York, New York 10001

Dear Ed:

Pursuant to your request, enclosed please find a copy of the Stipulation which was entered into by David Spatz, Continental Can Company, Inc. and three Overmeyer companies.

There does not seem to be any specific reference in the Stipulation to invoice numbers which the $75,721.73 covers. However, a check of my file records indicates that I was informed by David Wells, Attorney for Continental Can Company, that the $75,721.73 could be broken down as follows: $30,000.00 represents three months rent owing to Service Center, Inc. under the lease, and $45,721.73 represents handling charges owing to Service Center, Inc. My notes do not indicate for which three months the rental was owed.

I hope that this information is some assistance to you.

Cordially,

Tom

Thomas E. Tueth

TET/mh.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

In the Matter
of

D. H. OVERMYER COMPANY, INC.,
(CALIFORNIA),

Debtor.

No. 73 B 1131

United States Court House
Foley Square, New York, N.Y.

February 11, 1974
11:00 o'clock a.m.

LANDLORD'S MOTION FOR POSSESSION (SAN FRANCISCO #3)
BACHNER, TALLY & MANTELL

Before:

HON. ROY BABITT, Referee In Bankruptcy

BARRY W. RAYVID
Official Court Reporter
U.S. Courthouse (R. 230)
Foley Square, New York, N.Y. 10007

APPEARANCES:

BACHNER, TALLY & MANTELL, ESQS.
Attorneys for the Applicant
850 Third Avenue
New York, New York

BY: MARTIN D. POLEVOY, ESQ., Of Counsel

LEVY, LEVY & RUBACK, ESQS.
Attorneys for the Debtor
225 Broadway
New York, New York

BY: GARRY BLUM, ESQ., Of Counsel
-and-
BERTRAM R. LIFLAND, ESQ., Of Counsel

MR. DANIEL H. OVERMYER
President of the Debtor

BOOTH, LIPTON & LIPTON, ESQS.
Attorneys for the Receiver
292 Madison Avenue
New York, New York

BY: EDGAR H. BOOTH, ESQ., Of Counsel
-and-
WILL B. SANDLER, ESQ., Of Counsel

- - - - -

PROCEEDINGS

MR. BOOTH: This is San Francisco Number 3.

THE REFEREE: Has there been a stipulation of fact?

MR. SANDLER: Yes. On the first case we have stipulated.

THE REFEREE: Yes?

MR. SANDLER: It is hereby stipulated by and between counsel for the applicant, the receiver, and the debtor that:

(1) The debtor and the applicant entered into a lease for certain warehouse premises known as San Francisco Number 3, which lease was entered into on the first day of October, 1967.

The lease is for an initial term of twenty years with two five-year renewal options. Accordingly, at present the lease with the renewal option has an unexpired term of twenty-three years.

(2) On January 8th, 1974 the applicant landlord gave a thirty-day notice under the Bankruptcy Clause in the lease.

(3) A judgment against the debtor and against D. H. Overmyer Company, Inc. (Ohio), the parent, was entered into in the Superior

Court of California, County of Santa Clara, on November 14th, 1973 for twenty-one thousand eighty-four dollars and forty-eight cents.

(4) The rental under the lease is seven thousand eighty-three dollars and thirty-three cents.

THE REFEREE: A month?

MR. SANDLER: Per month, which represents the fixed monthly rent. In addition, under the lease the tenant is to pay taxes and make all repairs.

MR. POLEVOY: And whatever additional rent is stipulated and is set forth in the lease, including insurance.

MR. SANDLER: At this time we would like to mark the lease as Applicant's Exhibit Number "1"; the January 8th notice as Applicant's Exhibit Number "2" and the judgment as Applicant's Exhibit "3", all in evidence.

(At this time the said documents were so marked respectively as Applicant's Exhibits "1", "2" and "3" in evidence.)

MR. SANDLER: The landlord has one witness.

MR. POLEVOY: I would like to call Mr. Lawrence Mayer to the stand.

THE REFEREE: Will I hear proof on what the lease yields to the debtor?

MR. SANDLER: Apparently, they don't want to stipulate so I will put Mr. Flanagan on.

L A W R E N C E M A Y E R, having been duly sworn by Honorable Roy Babitt, was examined and testified as follows:

THE REFEREE: Please give your full name and home address to the reporter.

THE WITNESS: Lawrence Mayer, 1 Upper Toyon Road, Kentfield, California.

DIRECT-EXAMINATION BY MR. POLEVOY:

Q The owner of the property, Mr. Mayer, is Toronos (phonetics) as set forth in the lease. What relationship do you have to Toronos?

A I am their attorney.

Q Exhibit "3" was a judgment which was stipulated to. I will show you another judgment. Have you seen that before?

A Yes, I have.

Q Could you explain to the Court what that paper is?

A In the month of October there was an unlawful detainer action filed against D. H. Overmyer in regard to the San Jose warehouse commonly known as San Francisco Number 3. The time had expired for an answer.

As attorney for the plaintiffs, the Toronos, we requested the Court enter - - the clerk enter the default of Overmyer, and had requested a Court date for the hearing as to set attorneys' fees and damages in addition to the rent.

The clerk of the Court in accordance with California law entered the default judgment but did not set attorneys' fees nor damages. Those issues have not been decided.

The case is technically still pending; the award of those things has been stayed by the order of this Court.

THE REFEREE: What was the date of the default?

THE WITNESS: The entry of default was November 9th, 1973.

Q And, the amount entered was for?

A Eighty-seven hundred thirty-five dollars and seventy cents which included rent to that date since it was a demand for daily rental.

MR. POLEVOY: I would like to offer this.

A It's a clerk's entry of judgment which is not sufficient. The clerk's entry is given simultaneously when they file it.

MR. SANDLER: This is a request to enter default?

A That is correct.

MR. SANDLER: Since we have another judgment of the same California Court which we did not object to because it appears to be in proper form we accepted it.

This looks like an application?

A That is correct, it is an application. The Courts of California allow the clerk to enter the default.

THE REFEREE: Did he?

THE WITNESS: Yes, sir.

THE REFEREE: Are you telling me that the filing of the application requires the clerk as an administrative duty to enter the

default?

THE WITNESS: That is correct.

THE REFEREE: What is the legal effect of an entry under California law as you know it?

THE WITNESS: The default is entered as of that date. The actual damages and any attorneys' fees can not be awarded by the clerk, they must be awarded by the Court.

At the same time that the clerk enters the defaults you ask the clerk for a time at which time you ask the Court for attorneys' fees.

THE REFEREE: Is it your judgment that the administrative act of the clerk fixes the judgment except for attorneys' fees?

THE WITNESS: And damages as to reasonable damages.

THE REFEREE: That is really not a final judgment; it's not an appealable judgment.

THE WITNESS: No, it's not.

THE REFEREE: I don't know what probative value it has.

MR. LIFLAND: Further than that, there is no indication this is a paper from the Court. This is a Court form but all confirmed signatures are those of Mr. Mayer and not of the Court.

THE REFEREE: I am going to sustain an objection. I don't think that has probative value of the facts in issue.

Q Mr. Mayer, is it your understanding that this is a net lease?

A A triple net lease.

Q Essentially, that means all payments relating to the property other than, of course, rent to the Toronos, are to be paid by Overmyer?

A That is correct.

Q Mr. Mayer, do you know what the taxes are on this property for '73-'74?

A Approximately twenty-one thousand seven hundred dollars.

THE REFEREE: A year?

THE WITNESS: That is correct.

MR. POLEVOY: I have a tax bill. Would you stipulate as to that?

MR. SANDLER: Is there an address on

there?

A It's the parcel number.

MR. SANDLER: There is no way for me to identify this.

Q Mr. Mayer, is that the 1973-1974 tax bill for the property known as San Francisco Number 3?

A That is correct.

THE REFEREE: How do you know that?

THE WITNESS: Because I acquired it from the county assessor's office at my request. This was a copy of the tax bill.

The original tax bill was sent to Overmyer. If you will notice North King Road, and it does give the address of the property. It doesn't list it as San Francisco Number 3 but as 660 North King Road, San Jose, which is the legal address.

THE REFEREE: I will allow that, Mr. Sandler.

A The amount showing is twenty-one thousand seven hundred sixty-nine dollars and twelve cents. The first installment of this was delinquent, which we have since paid.

(At this time the said document was

so marked as Applicant's Exhibit "4" in evidence.)

THE REFEREE: Each counsel will be responsible for his own exhibits.

Q To date, what are the outstanding amounts owed to the Toronos with respect to this warehouse, for rent and taxes?

A Approximately twenty-one thousand dollars on the Confession of Judgment. There is fourteen thousand six hundred dollars - - I am rounding this off - - fourteen thousand dollars for the months of October and November; there is twelve thousand dollars for last year's taxes, that's '72-'73, the second installment.

There is the first installment of the '73-'74 taxes, which are approximately ten thousand dollars, so that is approximately fifty-nine thousand dollars.

Q What was the first installment for '73-'74?

A Eleven thousand something dollars including the penalty. Are you interested in why?

MR. POLEVOY: He can ask you that on cross.

Q Mr. Mayer, is there a local Overmyer manager who takes care of this particular property known as San Francisco Number 3?

A There was one. I don't know if one presently now exists.

Q Mr. Mayer, under the lease, I think we will stipulate Overmyer is to carry the insurance obligation and insure the warehouse in accordance with its terms.

Does Overmyer currently insure the premises pursuant to the terms of the lease?

A To my knowledge it does not.

THE REFEREE: But, the receiver does, doesn't he?

THE WITNESS: I have received no notification, Your Honor, that the receiver does. But, the lease requires we be informed of insurance and we have - - I have actually requested this of the receiver and I have received no answer.

Q Have you done anything to make sure that the property is properly insured?

A Yes, we are taking out individual binders - - when I say "we," I mean on this particular

property and others.

We have had other insurance binders insofar as fire liability and rent insurance which we will keep until we get some notice of proof that the receiver is doing it in accordance with the lease.

Q Mr. Mayer, are you aware of an maintenance problems at the warehouse?

MR. SANDLER: Objection.

THE REFEREE: What is the ground?

MR. SANDLER: He can testify as to what the physical conditions are.

THE REFEREE: I wish you wouldn't lead him. When were you last at the premises?

THE WITNESS: I have not been on the premises of the San Jose warehouse, period.

THE REFEREE: What is your knowledge as to its physical condition?

THE WITNESS: I have spoken to the renters of the two major portions of that warehouse, the California Canners & Growers rent eighty thousand square feet of that and Mr. Bob Lund is the manager and the officer in charge of that particular warehouse.

My last conversation with him was as

late as Friday of last week when we discussed some of the problems that have been in existence and that have been rectified by action on their part. That is the extent of my knowledge.

THE REFEREE: How can I take testimony as to the physical condition and maintenance and need for repairs? It's not any more hearsay than what you just explained?

THE WITNESS: I cannot argue that, Your Honor, but at the same time there is a problem of expecting witnesses to appear from California in this court.

THE REFEREE: Of course there are other procedures, pre-trial discovery procedures, depositions. But, the short of it is how am I going to receive from you the testimony about something you never have seen, were told, and it is further inadmissible by the word of this other individual that repairs have been made.

THE WITNESS: I won't quarrel.

THE REFEREE: I don't see any competent, probative evidence that I can take here going

to the issue of maintenance.

MR. POLEVOY: Then that's all, Your Honor.

CROSS-EXAMINATION BY MR. SANDLER:

Q Mr. Mayer, in connection with the Confession of Judgment which was marked as an exhibit, would you explain what that represents?

A Yes. This was a prior unlawful detainer action against Mr. Overmyer commenced in the early part of '73, sir. At that time Mr. Overmyer rather than having us take a judgment against him in unlawful detainer and regaining possession offered to pay the back rents at a certain rate plus maintaining current rents.

He offered in lieu of allowing us to take a judgment, stipulate judgement, to offer a Confession of Judgment on a dismissal on the unlawful detainer action. At that time I allowed him to do so.

He did pay certain of the back rents which were not actually related to the rents. Actually, he paid back fourteen thousand dollars each month on stipulated terms, and at that time he had paid back to where he only owed approximately eighteen thousand

something dollars.

The rest of the judgment is interest and attorneys' fees. I believe it's specified in there.

Q Unfortunately, the only thing we marked is a single page and it refers to a statment of facts. Do you have that with you?

A I have the abstraction of judgment.

Q Would you look at your file and tell us if you have any further information on that? Mr. Mayer, you have just searched your file and you do not have any further documents which would explain the underlying payment or settlement agreement, is that correct?

A That is not correct. I showed you an abstraction of judgment explaining exactly what the confession consists of.

Q That was the twenty-one thousand dollars?

A That is correct.

Q I am referring to the arrangements made at the time when other monthly payments were made prior to the entry of - -

A If you are speaking of the fact that the unlawful detainer action consisted of many months

of unpaid rent you are correct.

Q And, all of the other months, except what was included in the Confession of Judgement, were paid?

A That is correct.

Q The Confession of Judgment covered approximately three months?

A That is correct, approximately correct.

Q How many other months were included in the action but not in the Confession of Judgment?

A I would guess three additional.

Q Those three additional months to the best of your knowledge were paid?

A Late, yes.

Q They were paid, though?

A Yes.

Q Were they accepted?

A Yes.

Q Do you manage this property for the owners?

A No, I do not.

Q Who manages it for the owners?

A Ostensibly Overmyer manages it.

Q Did you represent the owner when the

property was acquired from Overmyer?

A No, I did not.

Q Have you had any communication with the sub-tenants of that property?

A Yes, I have.

Q Have you instructed the sub-tenants or suggested to them orally or in writing that they should withhold rent from the receiver?

A No, I have not.

MR. SANDLER: No further questions.

REDIRECT- EXAMINATION BY MR. POLEVOY:

Q To the best of your knowledge have the Toronos received the January rent?

A No. They were promised it by the receiver - - I believe we were promised it by the receiver that we would receive rent after the month had been finished.

As of Saturday there was no rent received for the month of January.

THE REFEREE: Use and occupancy?

THE WITNESS: That is correct, Your Honor.

THE REFEREE: How come?

MR. SANDLER: I don't know.

Q Did you receive December's rent?

A Yes, we did.

Q Did I send you December's rent?

A Mr. Polevoy sent me the check for the December rent which, I believe, was received from the Court.

MR. POLEVOY: I think there is a serious problem here as to January's rent.

THE REFEREE: What is the problem?

MR. POLEVOY: I don't know what other similar circustances other landlords have had with regard to holding their January rent.

THE REFEREE: Why don't you worry about your client.

MR. SANDLER: If they received December's rent I don't know why they didn't receive January's rent.

THE REFEREE: Find out about it.

MR. SANDLER: Immediately. If you want I can call the office now.

THE REFEREE: I want to find out.

MR. LIFLAND: The only indication I have is when the original 69D motion was drawn up this was one of the properties

listed. Since that time we discovered it was not any fault of the landlord's and that motion was withdrawn. It may well be that the tenants have not paid the landlord or ourselves.

THE REFEREE: That's your problem to collect.

MR. LIFLAND: I assume we can get cooperation and a direction for the tenants to pay.

MR. POLEVOY: Don't look at me.

THE WITNESS: We have never instructed them any other way.

THE REFEREE: I want them to be paid.

THE WITNESS: We have submitted an affidavit to this Court. In addition, we hold no rent regardless of - -

THE REFEREE: Be that as it may, he gets paid unless a real good reason is shown to the Court. I would suggest you communicate with the receiver, Mr. Herzog, on Wednesday when he will be back. I want to know why your people have not been dealt with like everybody else.

MR. POLEVOY: Thank you, Your Honor.

THE REFEREE: Anything else?

RECROSS EXAMINATION BY MR. SANDLER:

Q Mr. Mayer, do you have any knowledge as to whether or not the receiver has taken out insurance in connection with this building?

A I just stated I have no knowledge.

Q The receiver has stated in open court, and his testimony has been stated and accepted, he has taken out insurance for each building at a cost of eighteen hundred dollars per annum.

Do you have any reason to object to that or question that?

A Only insofar as I have no knowledge and have received no certificate of insurance showing we are one of the insured.

MR. POLEVOY: Did you write specifically to the receiver about the insurance?

A Yes, I did.

MR. POLEVOY: Did you get a response?

A No, I have not.

Q When did you write to him?

A I believe the date is January 22nd.

THE REFEREE: You will undertake to ascertain the coverage on this building. It

has generally been stipulated throughout that the receiver in each case has covered the properties in the amount of one hundred fifty dollars per month which would be deducted from the operations of the building so we could eventually determine whether the operations are profitable.

THE WITNESS: There are various types of insurance required to be carried by the tenant. To my knowledge I have information as to another piece of property where I have found out indirectly there was insurance being covered that covered only fire insurance and did not cover liability. The lease in that instance covered liability insurance.

THE REFEREE: You can't claim termination and at the same time look to the lease. The receiver is covering properties.

MR. POLEVOY: In accordance with the terms of the lease the receiver is supposed to cover such insurance as is specified in the lease.

THE REFEREE: I don't know.

THE WITNESS: This leaves the landlord

- -

THE REFEREE: Exposed.

THE WITNESS: We don't know what to do; we don't know whether or not to cover the property.

THE REFEREE: Mr. Sandler and Mr. Lifland, find out from the receiver if he has coverage, how much that is, and forthwith the landlord shall be advised so that if he wants to take on additional coverage, he will do that.

MR. POLEVOY: On that insurance point, is the insurance as specified in the lease?

THE REFEREE: It's an insurance policy taken on by the receiver covering each of the properties over which he is receiver. The average premium is running eighteen hundred dollars per property.

MR. POLEVOY: But not particularly with reference to each lease?

THE REFEREE: No. I can't burden the estate with additional charges while we are all laboring so hard to keep this debtor alive. I don't know why, either. Thank

you, sir.

S A M U E L H. F L A N A G A N, having been duly sworn by Honorable Roy Babitt, was examined and testified as follows;

THE REFEREE: Please give your full name and home address to the reporter.

THE WITNESS: Samuel H. Flanagan, 2 Chester Road, Darian, Connecticut.

DIRECT-EXAMINATION BY MR. SANDLER:

Q Mr. Flanagan, are you presently employed by the receiver?

A Yes.

Q In what capacity?

A In the area of marketing, sales, and the collection of rents.

Q Prior to being employed by the receiver, were you also employed by the debtor in a similar capacity?

A Yes.

Q How long did you work for the debtor prior to the commencement of these proceedings?

A A little over nine years.

Q Are you familiar with the property known as San Fransisco Number 3?

A Yes.

Q Are records kept by the receiver as previously by the debtor in the ordinary course of business indicating rentals received from sub-tenants?

A Yes.

Q Do you have those records here with regard to San Fransisco Number 3?

A Yes.

Q What do those records indicate is to be collected from sub-tenants on San Fransisco Number 3?

A Ten thousand nine hundred dollars a month.

Q What is paid, according to your records, under the lease for rent and taxes?

A Eighty-nine hundred seventy-two dollars.

Q The difference is what?

A Twenty-three thousand one hundred thirty-six dollars per year.

THE REFEREE: Is the place fully occupied?

THE WITNESS: Yes, sir.

MR. SANDLER: No further questions.

THE REFEREE: I think at this point Mr. Polevoy should understand what items are reduced from whatever Mr. Flanagan's testimony has been.

It has been stipulated as follows:

(1) That the amount of realization has got to be reduced by one hundred fifty dollars a month for insurance. The receiver one day soon will testify as to the allocation from the overall operation of the Overmyer enterprise what amount will be allocable to each property, including this, which will further reduce it.

In other words, if this property is charged one thousand dollars on the overall budget of the Overmyer administration that would further reduce Mr. Flanagan's figures.

Thirdly, if there is on-cite administration expenses that will further reduce it.

And, finally, Mr. Guy is going to testify, as soon as we are finished with Mr.

Flanagan, as to the reserve in the overall Overmyer structure for a fund on maintenance and repairs which will probably reduce this further because it's an allocation given on an overall budget.

Is that about right, Mr. Sandler?

MR. SANDLER: Yes, sir.

THE REFEREE: We are talking about a little under two thousand dollars a month, according to Mr. Flanagan, as a gross, top of the line, figure.

Now, you may proceed.

And you will have the right of cross-examination of Mr. Herzog and/or his accountant who will soon structure this overall administration charge.

CROSS-EXAMINATION BY MR. POLEVOY:

Q You said your total receipts were ten thousand nine hundred dollars and the expenses were eighty-nine hundred seventy-two dollars?

A Yes.

Q Rent and taxes were eighty-nine hundred seventy-two dollars?

A Yes.

Q Which leaves a balance net per month absent the other things of eleven hundred twenty-eight dollars per month, is my math wrong?

A I have twenty-three thousand one hundred thirty-six dollars per year.

THE REFEREE: That's almost two thousand dollars per month.

Q You said ten thousand nine hundred dollars gross receipts per month?

A Yes.

Q I believe you said rent and taxes were eighty-nine hundred seventy-two dollars?

A Yes.

THE REFEREE: That's about two thousand dollars a month.

THE WITNESS: Nineteen hundred thirty-eight dollars.

THE REFEREE: Which is about twenty thousand dollars a year.

Q How many sub-tenants are there in the premises?

A Four.

Q Can I have the names, please?

A California Canners & Growers; Dealer's

Transit; Singer; and Frito-Lay.

Q California Canners, when does their term end?

A All of them are short-term leases.

Q What do you mean by "short-term leases?"

A They terminate in less than twelve months.

Q Are any month to month?

A This does not indicate. I would assume so.

Q But, you don't know which ones are month to month?

A All of them will terminate in less than a year.

Q My question to you is are any of the four sub-tenants on a month to month tenancy?

A They are all short-term. Whether any of them are month to month I do not know, the records do not indicate.

THE REFEREE: When will the earliest one expire?

THE WITNESS: It doesn't indicate. It just indicates they are all short-term.

THE REFEREE: By "short-term" you then conclude it means within a year?

THE WITNESS: Less than a year.

Q Could it be less than a month?

A Yes.

Q They all could be ending February 28th as far as you know?

A Yes, could be.

Q Have any efforts been made to contact these people to re-rent the premises?

A Yes.

Q What efforts have been made?

A I can't speak of my knowledge but there is an individual in the office that has talked with them.

Q What is the name of that individual?

A Bob Lamnick.

Q Is he in court today?

A No, he is not.

Q We have sub-leases with terms ending anywhere from February 28th, 1974 to until January 31st, 1975?

A As a matter of fact, I believe California Canners has terminated. I think they are

on a hold-over.

Q Do you know of any others whose leases have terminated?

A No. The only other one which would be of any significance would be Dealer's Transit.

Q You don't know when their lease terminates?

A No.

THE REFEREE: How much of a footage does California have?

MR. POLEVOY: I was going to ask that.

Q Do you know the rent per month for each of these people?

A Yes.

Q California Canners, how much is the rent per month?

A Sixty-eight hundred dollars.

Q They are a hold-over right now?

A Yes.

Q Dealer's Transit?

A Thirty-seven hundred dollars.

Q Singer?

A Three hundred dollars.

Q Frito-Lay?

A One hundred dollars.

Q Do you know how many square feet each of these tenants occupy?

A These records do not indicate the square footage.

THE REFEREE: Just judging from what he said California probably has two-thirds, roughly, and the next big one probably has a third less minor space, judging from the rent roll.

THE WITNESS: It was testified that California Canners have eighty thousand.

THE REFEREE: Out of one hundred twenty?

THE WITNESS: Yes.

Q Would you happen to know what the rent per square foot per month is for each of these sub-tenants? Do you have any records that indicate that?

A No.

THE REFEREE: Would you, Mr. Flanagan, have any knowledge of the present situation in that area of the United States for re-rental of warehouse facilities such as this,

your own knowledge?

THE WITNESS: No. Any knowledge I would have would come to me through some other individual.

THE REFEREE: You don't know if the market is soft in the San Francisco area? Do you know of your own knowledge anything about the San Francisco area for renting?

THE WITNESS: There are sections of San Francisco where the market is soft.

Q You don't know whether or not this is in that locale?

A I have been given to believe this is a good location.

Q In your experience, if you have a tenant or sub-tenant in a warehouse that occupies two-thirds of that warehouse and that lease has expired or is about to expire, would you become concerned about it if they were on a hold-over status? They seem to be carrying the warehouse.

A I am concerned about any tenant expiring.

Q In this particular situation, when two-thirds of a warehouse that you say is one hundred pre-

sently - - one hundred percent occupied - - has a lease that has expired - -

A Yes.

Q - - can you tell the Court of any specific efforts that have been made to enter into new leases in connection with this particular tenant?

A There have been conversations between the office and California Canners regarding extending or renewing their lease.

Q But not with you directly?

A Not with me directly.

Q And, you directly or indirectly don't know of any firm terms that have been entered into?

A No, sir.

Q I don't want to repeat myself but have any of the other sub-tenants notified you that they intend to vacate or will vacate the warehouse?

A Not to my knowledge.

THE REFEREE: Has California told you they would like to vacate?

THE WITNESS: It's my understanding they would like to remain.

Q Your understanding from whom?

A The individual in the office who has

been in communication.

Q Are you aware of any complaints that California Canners have made to Overmyer with respect to the conditions existing at the warehouse?

A No, I am not.

Q Who would be aware of the complaints, if such complaints were made, within the Overmyer organization?

A If it was in writing it would have passed across my desk.

THE REFEREE: This is unproductive at this point.

Q Was any specific - -

A Since December it would have crossed my desk.

Q Has any writing crossed your desk from California Canners stating that the condition of the roof is unsatisfactory and there's leaks at the premises?

A Not to my knowledge.

Q Who is responsible for paying the utilities at the premises?

A Anything I would tell you would be conjecture. The tenants are responsible for paying the

utility charges.

THE REFEREE: You mean, the sub-tenants?

THE WITNESS: Yes, sir.

THE REFEREE: California Canners?

THE WITNESS: It may be it's a common tenant.

Q Would you be surprised to know in fact the sub-tenants do not pay the utilities?

A If you let me finish I will tell you what I know of the situation. As I told you, with regard to San Francisco Number 3, I don't know what the meter set-up is. But, the sub-tenants are responsible, unless there are unusual leases, for any charges incurred for utilities.

A good many of the properties have individual meters by which the sub-tenants are invoiced directly. There are many buildings that have common meters in which the sub-tenants are re-invoiced by the Overmyer organization, and if this is the instance with San Francisco Number 3, then I believe that the receiver would be obligated to the utility company and the tenant would be obligated to the receiver for the utilities.

Q There is a possibility that the receiver

or Overmyer would be responsible for the payments of the utilities directly to the utility companies?

A It is a possibility, sure.

Q I will show you an agreement of sub-lease as entered into between Overmyer and, in this case, Economic Laboratory, Inc., in which it provides that the sub-tenant pays to Overmyer the utilities.

MR. LIFLAND: Objection. That is completely irrelevant to this matter.

THE REFEREE: I don't see it. Whatever Overmyer may have contracted for was - - it has nothing to do with these tenants.

MR. POLEVOY: May I mention something to you off the record?

THE REFEREE: Off the record.

(Discussion off the record.)

THE REFEREE: Certainly that lease is irrelevant.

THE WITNESS: The receiver - - with regard to the receiver and utility bills, in every instance that I have been involved in where there has been a question as to the utility bills having to be paid, the receiver's attorneys if the receiver is in possession of

the building has directed that the utility bills be paid by the receiver.

THE REFEREE: I would assume that's logical.

MR. MAYER: It's logical but unfortunately, it's not happening.

MR. LIFLAND: Is this on the record or off the record?

THE REFEREE: It's actually well beyond the scope of the examination. The receiver should ascertain whether it's keeping the utilities current.

MR. LIFLAND: I believe the receiver is making the payments or, in the alternative, sub-tenants are making payments as they are required to.

THE REFEREE: At least the lights are still on.

MR. MAYER: The only reason they are still on - - I don't know if the bills were paid. If the tenants paid the bills, they were billed to ODS.

THE REFEREE: Is that it?

MR. POLEVOY: That's it, Your Honor.

THE REFEREE: Are you finished with this witness?

MR. SANDLER: Just a couple more questions.

RE-CROSS-EXAMINATION BY MR. SANDLER:

Q Mr. Flanagan, are you familiar with the rental market for warehouse space in the San Francisco area?

THE REFEREE: I asked him that already.

MR. SANDLER: I want to tie it into the rental that California Canners was paying.

THE REFEREE: Go ahead.

Q Mr. Flanagan, California Canners occupies eighty thousand square feet and at present pays sixty-six hundred dollars, which is approximately eight and a half cents per annum.

Would you say that is comparable or more or less than what is being charged in the area for comparable warehouse space?

A That's on the low side.

Q What they are paying now is on the low side?

A Yes.

THE REFEREE: Thank you, Mr. Flanagan.

M U R R A Y G U Y, having been duly sworn by Honorable Roy Babitt, was examined and testified as follows:

THE REFEREE: Please give your full name and home address to the reporter.

THE WITNESS: Murray Guy, 74 Briar Brae Road, Stamford, Connecticut.

DIRECT-EXAMINATION BY MR. SANDLER:

Q Mr. Guy, are you presently employed by the receiver?

A Yes.

Q In what capacity?

A In the field of engineering, construction, maintenance.

Q Would you state your educational background and your professional background?

MR. POLEVOY: We will waive that.

MR. SANDLER: Stipulated that he is an expert witness?

MR. POLEVOY: I will stipulate to what he has said before.

MR. SANDLER: You will stipulate to his qualifications as testified to before?

MR. POLEVOY: Yes.

Q Mr. Guy, prior to being employed by the receiver, were you employed by the debtor in a similar capacity?

A Yes, I was.

Q In that capacity and in your present capacity have you developed general figures as to the cost of routine maintenance for the Overmyer warehouses?

A Yes, I have.

Q Would you tell us approximately what that figure is, what it includes and how you arrived at it?

A We program approximately two cents a square foot for annual maintenance, routine re-occurring maintenance items, and years ago we also were adding about the same amount of money that we would set aside for particular major non-re-occurring items.

Assuming we had thirty million feet, we were talking about six hundred thousand dollars as a maintenance budget for day-in day-out maintenance, and an upgrading program for about the same amount of money.

Q Can you tell me, to your knowledge, whether this particular warehouse requires any unusual maintenance or non-re-occurring maintenance?

A This particular warehouse has been reported in need of a paint job.

THE REFEREE: That is not within the two cent a foot allocation?

THE WITNESS: No, but it was on our list to be painted in the near future. And, it had asphalt work of a patching nature needed in the drive-way area; and on two different occasions we made minor roof repairs. I know of none today.

THE REFEREE: You know of none today. Does that mean there was no need or no roof repairs?

THE WITNESS: I know of none.

THE REFEREE: None what?

THE WITNESS: Roof repairs.

THE REFEREE: That are needed.

THE WITNESS: None.

Q Mr. Guy, in connection with the painting and other items you testified to where work is required, can you give us your estimate of what it would cost to do that work?

A We had estimated our work to cost twelve thousand dollars.

MR. SANDLER: No further questions.

A Which is a pretty high figure.

CROSS-EXAMINATION BY MR. POLEVOY:

Q You said "twelve thousand dollars." Is that for the paint job, or for what?

A That is to paint and do the patching in the areas of asphalt and the truck-way and drive-way entrance.

Q When you are saying the twelve thousand dollar figure that includes painting and asphalt patching, paving, and not the roof?

A No, nothing on the roof. I have not, in the last eight or nine months received any indication there was any roof repair needed, any leaks in the building, and it would come to me.

Q This is in response to my question that I asked Mr. Flanagan, I assume. You just made a statement now without being prompted.

Is this in response to the question I asked Mr. Flanagan about ten minutes ago?

A No. We look at three major repairs - - roof, painting and paving work. The rest of the items like dock bumpers, floors, cracks, breaking of a window, breaking of a panel with the fork truck, that

is re-occurring maintenance.

Q If a sub-tenant sent a letter complaining about the condition of the roof, would it cross your desk?

A Definitely, whether it comes direct or not. It would be a matter of the initial postmark address.

Q You mentioned before that you did patch work on the roof, your records indicate?

A Yes.

Q Do your records indicate what type of work it was?

A It would have been quite minimal, as I recall, less than one day's work in each case.

Q If that patch work was inaffective to stop the leaks, what would your next course of action have been?

A I would have heard something about it.

Q I didn't ask you that, I said if the patch work was not affective, what would your next course be?

A You mean if we had to repair a leak?

Q What is the cost of a new roof on this building, one hundred twenty thousand square feet?

A Very expensive.

MR. SANDLER: I am going to object unless it's tied in. He can ask the cost of the building.

Q Can I have a dollar amount?

THE REFEREE: Do you know what it would cost to replace the roof?

THE WITNESS: Yes.

THE REFEREE: How much?

THE WITNESS: About ninety thousand dollars. It only costs sixty thousand dollars to put it on new.

Q Mr. Guy, have you personally inspected this property?

A The middle of July was the last time I was there.

Q Which year?

A '73.

Q You made a visual inspection of the roof and premises?

A No visual inspection of the roof but of the premises.

Q On what you saw, can you state the condition of the building?

A I concurred with the people requesting a paint job, it could use a paint job, and there was asphalt work to be upgraded; and, there were two dock bumpers that I believe have been replaced.

Q What was the reason for your making this inspection?

A I was negotiating the building of a new one in Oakland and at the same time that I was out there I visited all the Overmyer properties out there.

Q Was a request made for you to specifically visit this building?

A I took it upon myself to visit all our buildings and inspect them and put together a West Coast maintenance budget.

Q You said this building needs a new paint job and asphalt work. Where is this twelve thousand dollars going to come from?

A That is not my job, I wouldn't know.

MR. SANDLER: I object to the question.

THE REFEREE: Too late. It's answered that it's not his concern.

Q This twelve thousand dollars is not part of the two cent per square foot per year budget

for maintenance?

A No, I wouldn't consider it part of it.

Q Do you know of yourown knowledge whether or not there is a contingency fund for special type repairs like this that Overmyer currently has or the receiver has?

Q I have no knowledge of what is happening with the finances at all.

Q In other words, your job is more or less to be in charge of maintenance, et cetera, is that correct?

A One of the areas, yes.

Q Do you have any intention of directing that these repairs be made?

A Upon receipt of documented complaints of particular problems I take those and I evaluate that to include if necessary getting some official competitive prices. Upon my recommendation to the receiver, they will do this work.

MR. POLEVOY: To save the Court some time, it is not responsive to my question.

Q You said that twelve thousand dollars worth of work is needed?

A I didn't say "needed." It would be a

nice thing to do; it would be an upgrading, putting the building in top shape. I don't think that can be my objective at this time.

We don't have that luxury I know, and I am working on a very tight budget that will fix your plumbing, keep the water out of your building, and this kind of thing.

Q Not generally to maintain it in good condition?

THE REFEREE: A paint job doesn't make a building bad, does it?

MR. POLEVOY: I don't know, Your Honor. Mr. Guy testified it must have a paint job. That is his recommendation.

THE REFEREE: That's right.

MR. POLEVOY: Now he is telling me he doesn't have the money for it.

THE REFEREE: The receiver probably doesn't have the money at this stage to indulge now in the luxury of a facelifting as distinguished from repairs needed in the day-to-day operation.

Is that a fair statement, Mr. Guy?

THE WITNESS: Yes.

THE REFEREE: This is not the first time Mr. Guy is here lest you think I am testifying for him.

MR. POLEVOY: Yes, Your Honor.

THE REFEREE: This is a Chapter XI court which is hanging by its fingernails in this case. The Court will not authorize an overall facelift but it will authorize a few dollars for fixing holes in the macadam or whatever else they use in their lot. It's a matter of the debtor's priorities, bear in mind.

MR. POLEVOY: I have one question of Mr. Guy.

Q I believe in some point in some other trial you testified that in the event an emergency repair is needed, like a roof leak, et cetera, you would direct someone to make it, is that correct?

A Some local person, yes.

In your particular case or that area, yes, definitely.

Q Since Overmyer went into Chapter XI, have any of these emergency repairs been neccessitated where you called someone up to make a repair?

A Yes.

Q Have they questioned the means of the receiver to pay for the repairs before they made the repair?

A If they haven't I advised them of where we stand.

Q Have they made the repairs under those circumstances?

A Yes.

MR. POLEVOY: No further questions.

MR. SANDLER: No further questions.

THE REFEREE: Thank you, Mr. Guy.

Next witness?

MR. SANDLER: There are no further witnesses, Your Honor. That will conclude this case.

THE REFEREE: It will conclude it only insofar that we haven't got the testimony on further reducing the gross figure of Mr. Flanagan. Mr. Polevoy will be advised as to that.

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Q1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

In the Matter
of

D. H. OVERMYER COMPANY, INC.,

Debtor.

No. 73 B 1134

United States Court House
Foley Square, New York, N.Y.

June 12, 1974
8:30 A. M.

LANDLORD'S MOTION - ORDER TO SHOW CAUSE FOR POSSESSION OF PROPERTY TAMPA #3
(HAHN, HESSEN, MARGOLIS & RYAN)

Before:

HON. ROY BABITT, Referee In Bankruptcy

BARRY W. RAYVID
Official Court Reporter
U.S. Courthouse (R. 230)
Foley Square, New York, N.Y. 10007

APPEARANCES:

HAHN, HESSEN, MARGOLIS & RYAN, ESQS.
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BY: DANIEL ZIMMERMAN, ESQ., Of Counsel

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BY: EDGARD H. BOOTH, ESQ., Of Counsel
-and-
WILL B. SANDLER, ESQ., Of Counsel

LEVY, LEVY & RUBACK, ESQS.
Attorneys for the Debtor
225 Broadway
New York, New York

BY: GARY BLUM, ESQ., Of Counsel

- - - - -

PROCEEDINGS

THE REFEREE: Are there any answers?

MR. SANDLER: The receiver served the answer.

MR. BLUM: The debtor serves its answer and hands up the original to the Court. It's an adoption of the receiver's

answer.

MR. SANDLER: If Your Honor please, the receiver's answer here varies a bit from all the other standard answers in these proceedings.

THE REFEREE: Why?

MR. SANDLER: On November 16th, 1973, the date of the filing of the petition, there was no default in the payment of rent to this landlord. All rent and additional rent was current as of November 16th.

The landlord subsequently accepted rent for the months of December, January, February and March under the lease because no default had been declared by the landlord under the lease, no action had been instituted, no letter had been written so that we contend we have a classic waiver of that and estoppal of the landlord's alleged right to now allege a termination under the bankruptcy clause.

We feel - -

THE REFEREE: I can't see anything more self-defeating, Mr. Zimmerman, as a matter of law. If those are the facts, I can't see any-

thing more defeating with respect to the four cases on this matter which you have litigated and the forty that others have litigated, particularly since the Court of Appeals affirmed Judge Judd's decision yesterday.

I don't understand how lawyers operate but if you think this serves the cause, of the fifty cases that were litigated, where there is no default, there must be something wrong with my idea of what the law is about, besides filing pleadings.

MR. ZIMMERMAN: Mr. Sandler certainly had not given the full details.

THE REFEREE: Was there a default - - not now - - was there at the time the petition was filed by the debtor a default?

MR. ZIMMERMAN: There was no default, other than the filing of a petition itself.

THE REFEREE: I can't think of anything more self-defeating. I always understood lawyers understood the game of chess and didn't rush into knock off the queen and get raped also.

MR. ZIMMERMAN: Lawyers represent

clients.

THE REFEREE: Can you think of anything more self-defeating where we have been litigating fifty cases involving substantial defaults, fifty including at least half a dozen of yours where there was a default?

Can you think of anything more defeating - - self-defeating - - than to have a case like this tried and be part and parcel of the affirmance by the Court of Appeals.

Off the record.

(Discussion off the record.)

R O B E R T F I X E L L, having been duly sworn by Honorable Roy Babitt, was examined and testified as follows:

THE REFEREE: Please give your full name and home address to the reporter.

THE WITNESS: Robert Fixell, 176 Quaspeck Boulevard, Valley Cottage, New York.

MR. ZIMMERMAN: Before we examine this witness, I would like to make a motion that

all of the preliminary remarks of counsel for the receiver be stricken.

THE REFEREE: That is not evidence, counsel's remarks and your remarks are not evidence.

DIRECT-EXAMINATION BY MR. ZIMMERMAN:

Q Mr. Fixell, what is your relationship to 72 Barrow Street Realty Corporation?

A I am the secretary of the corporation.

Q Are you a stockholder?

A Yes, I am.

Q Mr. Fixell, is 72 Barrow Street Realty Corporation the landlord of the Overmyer warehouse known as Tampa #3?

A Yes.

Q Mr. Fixell, are you familiar with the lease of the premises, that is, this warehouse, between the landlord and Overmyer?

A Yes, I am.

Q Is there an obligation under that lease for Overmyer to pay the real property taxes on this warehouse when they are due?

A Yes, there is.

Q When were the last tax payments due?

A The last tax payments were due April 1st, 1974, for the 1973 year.

Q Did Overmyer pay these taxes?

A No, they did not.

Q Did Overmyer deliver to you a receipt from the taxing authorities indicating that they had paid these taxes?

A No, they did not.

Q Mr. Fixell, I show you two pieces of paper and ask you if you can identify these pieces of paper.

A Yes, this is the tax bill on the property which was due November 20th, 1973 and had to be paid by April 1st, 1974.

MR. ZIMMERMAN: I would like these marked for identification as Applicant's Exhibit "1".

(At this time, the said referred to documents were so marked as Applicant's Exhibit "1" for identification.)

MR. ZIMMERMAN: I would like to have them marked in evidence.

MR. SANDLER: If Your Honor please, with regard to the proposed exhibit, Exhibit Number "1", I note that the taxes for the

1973 tax year which is a pre-petition period and the tax did not mature until after November 16th, 1973, and we have no objection to the admission.

THE REFEREE: Why are you making a speech?

(At this time, the said document was so marked as Applicant's Exhibit "1" in evidence.)

Q Mr. Fixell, did you yourself pay the taxes that were due on this warehouse?

A Yes, I did.

Q Mr. Fixell, have you received any tax monies from the receiver and/or debtor, applicable to the 1973 year?

A None at all.

THE REFEREE: Have the taxes since the filing of the petition, been kept up by the receiver?

MR. SANDLER: Your Honor, they are being escrowed from the period of December, 1973.

THE REFEREE: That is a default, isn't it?

MR. SANDLER: We are escrowing forward;

we are escrowing now for 1974.

Q Mr. Fixell, I show you a document called "A Lease," bearing the date of April 20th, 1967, and ask you if you can identify this document?

A Yes, I can.

Q Is this the lease that was executed between the landlord predecessor and D. H. Overmyer?

A Yes, it is.

MR. ZIMMERMAN: Your Honor, I would like to have this marked for identification as Applicant's Exhibit "2".

MR. SANDLER: No objection.

(At this time, the said document was so marked as Applicant's Exhibit "2" for identification.)

MR. ZIMMERMAN: I would like that marked in evidence.

THE REFEREE: Not for identification, in evidence?

MR. ZIMMERMAN: In evidence.

(At this time, the said document was so marked as Applicant's Exhibit "2" in evidence.)

Q Mr. Fixell, I show you another document entitled "Assignment of Lease," and ask you if you can identify this document?

A Yes, this is an assignment of lease.

Q Is this assignment from the original lessor owner of the property to 72 Barrow Street Realty Corporation?

A Yes, it is.

MR. ZIMMERMAN: I would like to have this marked as Applicant's Exhibit "3" in evidence.

(At this time, the said document was so marked as Applicant's Exhibit "3" in evidence.)

THE REFEREE: Is there any dispute that this is the proper party?

MR. ZIMMERMAN: No, Your Honor.

THE REFEREE: Why are you bothering with this?

MR. ZIMMERMAN: Because in their answer they admit these things upon information and belief and the lease has to be in evidence, in any event.

THE REFEREE: It seems to me all of this could have been conceded.

How much rent do you get under the lease, Mr. Fixell, the total amount of the rent?

THE WITNESS: Sixty-two hundred dollars.

THE REFEREE: Including taxes?

THE WITNESS: No, they pay for the taxes.

THE REFEREE: How much is that?

THE WITNESS: Taxes come to about thirteen thousand dollars a year.

THE REFEREE: Is the place fully rented?

THE WITNESS: I believe it's fully rented.

THE REFEREE: How much does Overmyer get from the subs?

THE WITNESS: I think they receive a year, about one hundred twenty thousand dollars. I am not exactly sure.

THE REFEREE: Nine thousand dollars a month?

THE WITNESS: Yes.

THE REFEREE: Why don't you get down to the case.

MR. ZIMMERMAN: That is not my case, Your Honor.

Q Mr. Fixell, have you received rent on

these premises for May of 1974 for use and occupation for that month?

A No, I have not.

MR. ZIMMERMAN: No further questions.

CROSS-EXAMINATION BY MR. SANDLER:

Q Mr. Fixell, did you authorize your attorneys to send a default notice to Overmyer on your behalf by reason of the non-payment of April and May, 1974 rent?

I show you a letter dated May 16th, 1974, addressed to Overmyer from Mr. Zimmerman, stating the following:

"Notice is hereby given that the rents due April 1st and May 1st, 1974, have not been paid and the lessee is in default?"

A Yes.

Q Did you authorize the sending of that letter?

A Yes.

Q Are you familiar with the fact it was sent?

A No.

Q Did you authorize the sending of the letter?

A Yes.

Q Subsequently did you receive a check for the April, 1974 rent?

A Yes.

Q Did you accept the check?

A Yes.

Q Did you deposit it?

A Yes.

Q Did it clear?

A Yes.

Q On November 16th, 1973, was Overmyer in default to you in the payment of rent under this lease?

A No.

Q When did you receive the November, 1973 rent?

MR. ZIMMERMAN: Your Honor, I object to that.

THE REFEREE: Overruled.

MR. ZIMMERMAN: May I state my objection, please?

THE REFEREE: Overruled.

A When did I receive the November rent? - - I must have received it in the early part of

November.

Q Did you subsequently receive the December, 1973 rent?

A No.

Q You never got paid?

A Oh, did I get it later on?

THE REFEREE: That is not rent, that is use and occupancy for the receiver, isn't it?

MR. SANDLER: No, Your Honor. If this landlord did not elect to declare a default to commence a proceeding - -

THE REFEREE: In any event, December is the receiver's obligation?

MR. SANDLER: Yes.

Q I received it subsequent.

MR. ZIMMERMAN: Your Honor, I object to counsel's characterization of any post-petition payment as rent as opposed to use and occupation.

THE REFEREE: I think you are right. It doesn't matter. It is the receiver's obligation or the debtor's obligation.

Do you think this case is going to turn

on the nicety of whether it is U&O or rent?

MR. SANDLER: There is a waiver question.

THE REFEREE: Let's leave it as the receiver's obligation.

MR. SANDLER: Fine.

Q Did you receive a payment from the receiver for the December rent obligation under the lease?

A Yes.

Q Did you accept that payment?

A The rent, right.

Q At that time, had you declared a default under the lease?

A No.

Q When did you retain counsel to send this letter of May 16th, 1974, this letter of default?

A I believe it was in March - - I am not quite sure.

Q March of 1974?

A I think that it might have been because I could not get any payments out of the receiver. I kept on calling the receiver and they would ignore the payment of rent to me while they were paying two other

landlords at that particular time.

Q What time was this?

A I got records of the letter.

Q Actually, at this point, you have received all rent paid from the receiver except for May, is that correct?

A May and June, which is due June 1st, plus I had to pay the taxes.

Q Right. Did you ever send a default notice to the debtor, Overmyer or the receiver for non-payment of taxes?

A For non-payment of taxes did I do that?

Q Did you or anybody in your behalf send a default notice for non-payment of taxes?

A I guess not, no.

MR. SANDLER: No further questions.

MR. BLUM: The debtor has no questions, Your Honor.

THE REFEREE: You did receive the payment for the May period?

THE WITNESS: No, May I have not received.

THE REFEREE: When is the May payment

due?

MR. SANDLER: None of the landlords have been paid.

THE REFEREE: In other words, it is for April - -

MR. SANDLER: Your Honor, April has been paid.

THE REFEREE: Well, now, we are running six weeks behind, and if things are going as they are, they will be eight weeks behind.

MR. SANDLER: We trust that by the end of this month we will pay - -

THE REFEREE: By the end of this month July's is due, is that correct?

MR. SANDLER: Correct.

THE REFEREE: This is a terrific operation, Mr. Sandler.

MR. SANDLER: It is not my operation. We are doing the best we can to cure this problem.

MR. ZIMMERMAN: Well, it has nothing to do with this trial.

THE REFEREE: Let me decide the regal implications, Mr. Zimmerman.

MR. ZIMMERMAN: Fine.

RE-DIRECT-EXAMINATION BY MR. ZIMMERMAN:

Q Mr. Fixell, do you recall when you, in fact, received the December use and occupation on these premises?

A What month?

Q December, 1973.

MR. SANDLER: Objection to the use of the term "use and occupation".

THE REFEREE: Let's call it the receiver's obligation.

Q Do you recall when you received the December payment for the receiver's occupation of the premises?

A No. Probably not before March or April.

THE REFEREE: Is that when you received December? When did you get January, February and March, if you got December in April?

THE WITNESS: I think they all came about the same time.

Q Mr. Fixell, did you, in fact, retain my law firm to represent you when you did not receive December's use and occupation?

A Yes, that's right.

Q And, the purpose of the retention was for you to get the December payment?

A That's right.

MR. SANDLER: Objection. Mr. Zimmerman is leading with that, and I ask that the answer be stricken.

THE REFEREE: It's a little late. Overruled.

Q Mr. Fixell, I show you Exhibit "A" to the application and ask you whether or not you have seen this document before?

A Yes, I have.

Q I direct you to Paragraph III of this document and ask you to read it to yourself.

A Yes, I read it.

Q Does this refresh your recollection that a notice of default was given to Overmyer in regard of its non-payment of taxes?

A Yes. I didn't see exactly what was -- actually, I saw this. This is what I saw; this is what was sent to me.

Q Would you then be willing to change your response?

MR. SANDLER: Objection, Your Honor,

leading.

Q (Continuing) - - to counsel for the receiver's question as to whether a notice - -

MR. SANDLER: Mr. Zimmerman is asking his witness to change his answer.

THE REFEREE: Overruled.

A Yes.

Q Was, in fact, a notice of termination sent in regard of the default in the payment of taxes?

A Yes, it was.

THE REFEREE: When was that?

MR. ZIMMERMAN: When was it sent, Your Honor?

THE REFEREE: Yes.

MR. ZIMMERMAN: May 16th.

THE REFEREE: We already covered that ground, haven't we? Didn't Mr. Sandler question about a letter allegedly sent by your office at the instance of Mr. Fixell's people?

MR. ZIMMERMAN: He asked him whether a default had been made on the taxes.

THE REFEREE: Proceed.

MR. ZIMMERMAN: I have no further questions.

MR. SANDLER: I have no further questions.

THE REFEREE: Thank you, sir.

(The witness leaves the stand.)

THE REFEREE: Your next witness, Mr. Zimmerman?

MR. ZIMMERMAN: Your Honor, I would like the Court to take judicial notice of its findings on April 18th, 1974, as to the overhead expenditures allocable to each one hundred twenty thousand square foot warehouse which appears on Page 87 of the transcript.

THE REFEREE: That is twenty thousand dollars a year?

MR. ZIMMERMAN: Yes.

THE REFEREE: There is a motion pending for the reopening of that proceeding.

MR. ZIMMERMAN: I am surprised it is pending. I was not served.

MR. BLUM: It went out last night.

THE REFEREE: I signed it last week.

Are there any other witnesses, Mr. Zimmerman?

MR. ZIMMERMAN: I would like, also, the

Court, since we have been proceeding somewhat out of turn, in permitting the receiver to cross-examine beyond the scope of cross-examination - -

MR. SANDLER: I object to that, Your Honor.

MR. ZIMMERMAN: And in the area of waiver which is his case and not my case.

THE REFEREE: You mean, if he called your witness at the end of your case, it would be all right?

MR. ZIMMERMAN: Certainly.

THE REFEREE: Well, it seems to me the order of a trial is so discretionary, why have him come back and forth?

MR. ZIMMERMAN: Fine. I would like to direct the Court - -

THE REFEREE: Don't direct me, invite me.

MR. ZIMMERMAN: I would ask that the Court take judicial notice of the transcript in this case of the hearing before Your Honor on December 27th, 1973, in which Your Honor, on Page 50 and the following pages stated or

agreed with the statement of Mr. Brecker, without dissent from the receiver or the debtor, that the landlords' acceptance of any checks without special endorsement would not be considered a waiver of any defaults under the lease, and with that, I close my presentation.

MR. SANDLER: If Your Honor please, I have a very clear recollection of that date and the remarks which were made on that date.

THE REFEREE: I don't think it makes any difference. If I made those remarks, they were probably gratuitous. Those were neither findings, rulings nor conclusions.

Go ahead. Who is your witness, Mr. Sandler?

MR. SANDLER: Can I just complete the sentence for the record.

My understanding was there was no waiver in connection with those landlords who had declared defaults and who were litigating with us.

MR. ZIMMERMAN: Before Mr. Flanagan takes the stand, I would like to read into the record the excerpts from this transcript.

On Page 50 Mr. Brecker says:

"MR. BRECKER: Your Honor, make a ruling in the event any landlord endorses, deposits or accepts a check delivered today that (A) It is not accepted as rent as to waive any default, but is use and occupation only and, secondly, that this is not accepted as the full amount allegedly due for the month of December.

Now, the receiver is in good faith calculating these amounts and I have no quarrel with that. But, I would like to have the right to do my own calculations.

THE REFEREE: Done.

MR. BRECKER: Is this Your Honor's ruling?

THE REFEREE: Yes, that is absolutely the ruling.

MR. BOOTH: We consent."

MR. BOOTH: We consent as to the waiver of any litigation.

MR. SANDLER: This is really historical. Mr. Zimmerman was reading Mr. Brecker - -

THE REFEREE: Please proceed.

S A M U E L H. F L A N A G A N, having been duly sworn by Honorable Roy Babitt, was examined and testified as follows:

THE REFEREE: Please give your full name and home address to the reporter.

THE WITNESS: Samuel H. Flanagan, 2 Chester Road, Darien, Connecticut.

DIRECT-EXAMINATION BY MR. SANDLER:

Q Mr. Flanagan, were you previously employed by the debtor?

A Yes.

Q In what capacity?

A In the sales and marketing areas.

Q For how long a period?

A A little over nine years.

Q Are you presently employed in a similar capacity by the receiver?

A Yes.

Q Are you familiar with the Tampa #3 warehouse?

A Yes.

Q Can you tell us who the sub-tenants at

the Tampa #3 warehouse are, what space they occupy, and what rent they pay?

A West Cash & Carry, forty thousand square feet. Their rental is two thousand dollars per month.

Q Can you give us the yearly rate per square foot?

A Sixty cents per square foot. Westflow Company, Inc., forty thousand square feet, thirty-seven hundred dollars per month, one dollar eleven cents per year. Murray Van & Storage, twenty-five thousand square feet of warehouse and twelve hundred twenty-five square feet of office. The warehouse is at one dollar ten cents and the office is at one dollar sixty-cents, and their monthly payment is twenty-four hundred fifty-five dollars.

Tampa Wholesale occupies fifteen thousand square feet and their monthly rental rate is fourteen hundred forty-seven dollars. I don't have that computed out to a yearly rate.

Q Do you know what the yearly rate is?

A I don't have it computed out.

MR. ZIMMERMAN: At this point I want to make an objection as to Mr. Flanagan's testimony regarding the monthly rental payments by

these tenants. The statements are at this point hearsay and not subject to any cross-examination. No foundation has been laid regarding - -

THE REFEREE: Overruled.

Q Mr. Flanagan, what is the aggregate - -

THE REFEREE: What does the total rent run?

THE WITNESS: Ninety-six hundred two dollars a month.

THE REFEREE: How much do the debtor's records show it should be paying or did pay to Mr. Fixell?

THE WITNESS: The rent should be sixty-two hundred forty-six dollars a month.

THE REFEREE: What other obligations are there?

THE WITNESS: Taxes are one thousand ninety-four dollars.

THE REFEREE: And?

THE WITNESS: They are the only fixed costs, seventy-three hundred forty dollars.

THE REFEREE: Against?

THE WITNESS: Ninety-six hundred two

dollars which gives us a gross of twenty-two hundred sixty-two dollars a month of twenty-seven thousand one hundred forty-four dollars per year.

Q Mr. Flanagan, you testified that Westflow is paying approximately one dollar eleven cents a foot?

A Yes.

Q And Murray Van is paying approximately one dollar ten cents a foot?

A Yes.

Q But that West Cash & Carry is paying sixty cents a foot?

A Yes.

Q In your opinion, is the sixty cents a foot a reasonable rental for this space?

MR. ZIMMERMAN: Objection as to relevancy.

THE REFEREE: Overruled.

MR. SANDLER: Counsel will establish the relevancy.

THE REFEREE: Establish the remainder of West Cash & Carry's obligation.

Q How long is the remaining term of the

West Cash sublease?

A It began June 15th, 1966 and goes through 6/14/76.

THE REFEREE: Then it has two years to go?

THE WITNESS: Yes.

THE REFEREE: So that regardless of what the fair rental value is in that area for others, for two years you are stuck with sixty cents with West Cash & Carry; is that so?

THE WITNESS: Under the terms and conditions of the lease, yes, sir.

THE REFEREE: So that the property as far as we are concerned, one half of it is being sold at one half the going rate, roughly?

THE WITNESS: Roughly, one half.

MR. SANDLER: I ask you to take notice that we have by order to show cause returnable June 20th, 1974 moved to disaffirm the West Cash & Carry sublease, but not to disturb their occupancy if they will pay the prevailing rent.

MR. ZIMMERMAN: I object to that unless

they are going to produce the documents so I have an opportunity to see them and make proper objections to relevancy, if any. I haven't seen these papers.

THE REFEREE: Why don't we take a five-minute recess and we will get it out of the motion drawer. I signed the order to show cause. When is it on the calendar?

MR. SANDLER: On June 20th. I will give an extra copy to Mr. Zimmerman.

THE REFEREE: You are asking me to take judicial notice and that means judicial notice of a document filed with me.

We will take a five-minute recess and I will ask Miss Padilla to pull it out.

(At this time a short recess was taken and all parties subsequently returned.)

THE REFEREE: We were at the point where you wanted me to take notice of the order to show cause signed on the 7th in connection with West Cash & Carry and the application to disaffirm the sublease.

MR. SANDLER: Yes, sir.

THE REFEREE: Mr. Zimmerman?

MR. ZIMMERMAN: Your Honor, I certainly have no objection to the Court's taking judicial notice of the fact this application was made. However, it's probaty to any matter before the Court - -

THE REFEREE: It's what?

MR. ZIMMERMAN: Probaty, materiality.

THE REFEREE: Is questionable?

MR. ZIMMERMAN: Escapes me.

THE REFEREE: It may not be material but I think it's certainly relevant understanding the reach of Section 513-1 of the Act, which gives the Court almost unfettered jurisdiction to reject a non-favorable lease. I will take it for whatever it's worth.

MR. ZIMMERMAN: Now, I have an objection at this point.

THE REFEREE: To this document?

MR. ZIMMERMAN: Not to that document but because of what came up. Mr. Flanagan was testifying about this West Cas[illegible] & Carry lease, and I believe that his testimony should be stricken about his lease until such time that the lease is produced and put into evidence.

THE REFEREE: It's your testimony from records of Overmyer kept in connection with property it owns?

THE WITNESS: Yes.

THE REFEREE: How many such properties were there?

THE WITNESS: Were there?

THE REFEREE: Yes, at the start of these proceedings?

THE WITNESS: Two hundred fifty odd.

THE REFEREE: Is this the method of keeping the records - - what are you reading from?

THE WITNESS: These are notes that I made.

THE REFEREE: From the file?

THE WITNESS: Yes.

MR. ZIMMERMAN: May I take a voir dire?

THE REFEREE: Yes. Your objection is overruled.

VOIR-DIRE EXAMINATION BY MR. ZIMMERMAN:

Q What are you reading from?

A From my notes.

MR. ZIMMERMAN: Can we have these notes marked for identification.

(At this time the said referred to paper was so marked as Applicant's Exhibit "4" for identification.)

Q Mr. Flangan, is it the normal course of the business of the receiver or was it the normal course of the business of the debtor, Overmyer to maintain this record?

A No.

MR. SANDLER: I object. It's obviously a facetious question.

A No.

THE REFEREE: Overruled.

A No.

MR. ZIMMERMAN: Your Honor, I renew my objection. This is not a business record.

THE REFEREE: Do you have knowledge of the lease with West Cash & Carry?

THE WITNESS: Yes, sir.

THE REFEREE: What is that knowledge based on?

THE WITNESS: The knowledge is based on a review of the files in the receiver's

possession, in the office, when I reviewed no later than Friday.

THE REFEREE: I will sustain the objection as to the document. I will leave the testimony in as to the West Cash & Carry lease.

MR. ZIMMERMAN: Your Honor, there is nothing to cross-examine on.

THE REFEREE: Cross-examine the lease.

MR. ZIMMERMAN: That is right. It is hearsay unless I can see it. I don't know what the terms are. I understand there is probably an option renewal.

THE REFEREE: I will sustain your objection except I will take judicial notice of this document filed with me and the allegations made in support ot it.

MR. ZIMMERMAN: I would like to object to any testimony with regard to the other subleases until such time that they are produced in the court.

THE REFEREE: I will sustain that objection. I will take Mr. Flanagan's statement only as to his knowledge from the records of the debtor as to what the total of those

leases add up to in dollars, that much and not more, and I have already heard on that from Mr. Flanagan, namely, seventy-three hundred forty dollars payable to Mr. Zimmerman's client, including taxes, a yield of ninety-six hundred two dollars a month, making a difference of twenty-two hundred sixty dollars, or so, just as the place now stands, as the figures now stand without more, without the new agreement with West Cash & Carry and without changing its lease or entering into a new lease.

Is there anything more?

MR. SANDLER: Mr. Zimmerman has cross-examined - -

MR. ZIMMERMAN: That was a voir dire on the evidence.

THE REFEREE: Anything more?

MR. SANDLER: I am through, Your Honor.

THE REFEREE: Mr. Zimmerman, have you examined?

MR. ZIMMERMAN: I am finished with this witness.

THE REFEREE: Thank you, Mr. Flanagan.

Mr. Guy?

M U R R A Y J. G U Y, having been duly sworn by Honorable Roy Babitt, was examined and testified as follows:

THE REFEREE: Please give your full name and home address to the reporter.

THE WITNESS: Murray J. Guy, 74 Brair Brae Road, Stamford, Connecticut.

MR. SANDLER: Will you stipulate Mr. Guy's qualifications?

MR. ZIMMERMAN: Yes.

THE REFEREE: Have you visited those premises recently, Mr. Guy?

THE WITNESS: Yes, I have.

THE REFEREE: What is the physical condition in your judgment, what is needed, how much money is needed?

THE WITNESS: I visited the premises on April 20th.

THE REFEREE: Of this year?

THE WITNESS: Yes, and I made arrangements to repair a majority of all defaults in

the building to include extensive roof repairs - -

THE REFEREE: How much is that?

THE WITNESS: Twenty-seven hundred sixty dollars, door repairs, three hundred twenty dollars - -

THE REFEREE: These are commitments for the jobs to be done?

THE WITNESS: These are jobs completed.

THE REFEREE: Continue.

THE WITNESS: We have committed and should complete maybe as even as early as today track repairs and fire sprinkler system repairs. That building then - -

THE REFEREE: How much are those repairs?

THE WITNESS: Six hundred eighty dollars total. In my opinion, then, the only additional work that would be needed on the property, and I am not saying it does need it now, within a year or a year and a half, maybe, is that place should be painted.

THE REFEREE: Would that be part of a program to paint comparables in the area,

or in the country, or part of a continuing program?

THE WITNESS: Yes.

THE REFEREE: Mr. Sandler?

DIRECT-EXAMINATION BY MR. SANDLER:

Q Mr. Guy, with the completion of the two remaining items which you testified may be completed today at a cost of which is six hundred eighty dollars, is there at the present time the need for any further repairs exclusive of the routine maintenance?

A Not that I am aware of.

THE REFEREE: Bumpers, the parking pavements, all the other things we have heard about in this long tale?

THE WITNESS: That building should not need any repairs. Essentially, I put it in good shape for them.

Q With respect to routine maintenance, and I put this question this way because Mr. Zimmerman indicated he would stipulate it would be the two cents per square foot you previously testified to with respect to other warehouses - -

A Yes.

MR. SANDLER: Do we have a stipulation on that, Mr. Zimmerman?

MR. ZIMMERMAN: Yes, we do.

THE REFEREE: Is there going to be a stipulation that as far as the record now stands in these proceedings - - I think, in any event, it should be made clear none of these cases is treated as a separate entity. They are all part and parcel of a total of fifty matters litigated and certain testimony in one will be held referrable to all - - that would include the allocation at this point of about seventeen hundred dollars per month for the general allocation of overhead expenses in New York referrable to all of the properties.

MR. SANDLER: That's of all items including maintenance, Your Honor.

THE REFEREE: We had heard from the receiver as to what amount of general overhead would be attributable to each building in the Overmyer complex just to give us a figure of - - what was that?

MR. ZIMMERMAN: Twenty thousand dollars.

THE REFEREE: A year?

MR. ZIMMERMAN: A year.

THE REFEREE: For each building?

MR. ZIMMERMAN: Yes.

THE REFEREE: Which is about seventeen hundred dollars a month.

MR. BLUM: But, that's an average.

MR. SANDLER: That twenty thousand dollars includes maintenance, includes insurance, and also includes the receiver's costs of administration.

MR. BLUM: And it is an average, Your Honor.

MR. ZIMMERMAN: That is a conclusion that I don't believe is warranted by the transcript of April 18th.

THE REFEREE: It doesn't really matter.

MR. ZIMMERMAN: We already asked the Court to take judicial notice of the April 18th testimony. I assume that the receiver and debtor join in with me in that request subject to any re-examination the Court might make subject to their motion which I am inform-

ed has been made yesterday.

MR. SANDLER: No further questions.

CROSS-EXAMINATION BY MR. ZIMMERMAN:

Q Mr. Guy, you testified to four kinds of repairs totaling approximately thirty-seven hundred sixty dollars.

Would this all be classified in terms of the regular maintenance for this building, the regular maintenance that is included at two cents a square foot?

A Yes.

Q So that you would say for the year we would be talking about an expenditure on this building which is substantially fifty percent higher than the two cents a square foot?

A I only put one hundred thirty dollars into that building the previous year.

Q We are talking just about this year, 1974; we are talking about a higher expenditure and two cents a square foot for this particular building?

A I don't think you can isolate that case. You have to look - - all my figures are based on two or three-year averages minimum so you can't do one

job - -

Q Mr. Guy, I am not contesting. I am consenting to and agreeing with two cents a square foot despite my prior practice.

What I am saying is this is one of those buildings that for this year exceeded that average, is that correct?

A I don't really think that I would go along with that because in my testimony I think I said two cents a square foot for rountine, ongoing maintenance.

Also, I have stipulated or testified that in addition to that for extraordinary items, and so on, we have held back as much as a penny which means three cents you are looking at.

Q Are you testifying that the roof repairs, the door repairs, the track repairs and sprinkler repairs are outside or any part of it is outside the ambit of routine maintenance?

A Yes. We replaced the expansion joint on the building which is something you do once in ten years.

Q How much did that cost?

A Seven hundred eighty dollars.

THE REFEREE: When was that?

THE WITNESS: I did it along with the roof repair. It is part of that price. It should never happen, really.

Q What is it going to cost to paint this building?

A I suppose seven thousand dollars.

THE REFEREE: When will that be expected to be done?

THE WITNESS: If not next summer, the summer after.

THE REFEREE: If not '75, maybe '76?

THE WITNESS: I would think.

THE REFEREE: Is that in keeping with your program for constant refurbishing?

THE WITNESS: Yes.

THE REFEREE: That's part of a separate budget which you testified to many times, the overall sprucing up of the exterior.

MR. ZIMMERMAN: No further questions.

MR. SANDLER: No further questions.

MR. BLUM: No questions.

MR. ZIMMERMAN: Your Honor, I think I would like, again, on rebuttal to just put

into evidence - - I would like to note that the answer of the receiver which has been adopted by the debtor states in Paragraph 19A that the default under the lease had been cured in the plan of arrangement. I would like the Court to take judicial notice - -

THE REFEREE: Of the plan that has been offered?

MR. ZIMMERMAN: No, of the receiver's application attached to a notice of motion and application to consolidate the proceedings, Paragraph 18 of which says that the plan proposed by the subsidiary corporations, the parent corporation, has not been accepted.

THE REFEREE: All right. I think it ought be noted at the outset this is a hybrid motion in that it alleges basically a default either accruing during the period of the receivership, that is to say, taxes for a period prior to the receivership but which accrued during the stewardship of the receivership. And, it involves a non-default in rent prior to the filing of the petition.

It is, thus, unlike the possibly forty-

five or fifty cases which the Court has already tried and upon which it has reserved decision which involves the question of whether or not a termination clause by reason of the filing of a bankruptcy or an arrangement petition is enforceable generally, and in the context of this case. Therefore, it is my purpose in announcing my decision in this contest to as narrowly as possible adhere to the facts presented here, so as not in any way to give suggestion that the Court at this point has made up its mind as to the issues of law and the facts presented in those other litigations.

Basically, this is a case brought on by the owner-lessor of property in Tampa, Florida why the receiver should not be directed to turn over that property upon the ground that he has been late in the payment of the charges for use and occupancy during the stewardship of the receiver. The Court does not feel in the context of the pleadings here it is necessary to go into the question of whether or not the filing of the petition here has terminated the lease, nor is it necessary to

go into the question at this time of whether or not the acceptance of the receiver's use and occupany following the filing of the petition constitutes a waiver.

The Court will note, however, from the evidence there is approximately a six to eight week lag in the discharge of the receiver's obligation to keep the use and occupancy of the premises, all of those premises, current. That is to say, the monies due the landlords for the period of May will probably not be paid until the end of June; the use for the period of April was not paid until close to the end of May, if not the very end of May. Since, typically, use and occupancy is due on the 1st of the month, it seems clear and the Court finds there is a two-month default by the receiver.

At the same time, the Court because of its intimate knowledge of these cases and its overall jurisdiction over the life of any Chapter XI, in keeping with the scheme of Congress, notes there has been some reduction in the receiver's use and occupancy; there have

been premises restored to the owners because it was concluded by the receiver and debtor these were not viable enterprises which would conceivably play a part in the rehabilitation of the debtor assuming, of course, it is able to be rehabilitated within the context and scheme of the Chapter XI arrangement proceedings under which it finds itself.

The motion is in all respects at this point denied. The reasons for the denial are as follows:

Number one, it is an inherent power of this Court to keep a debtor in possession of its property, at least until it's able to come to an accord with its creditors, whether in a plan or otherwise, and there is no doubt of that power, and I rely primarily at this juncture on in re: Lane Foods, a decision of Judge Weinfeld of this Court. I adopt all of that decision for the purpose of this controversey save for what might be implicit in Judge Weinfeld's language that the stay might at some point be terminated or that the debtor could re-negotiate a lease, a new lease, with

the landlord. I do not adopt that and do not find that the lease has in any respect been terminated.

I also note for the record that even casting the facts most favorably in favor of the landlord, 72 Barrow Street Realty Corporation, that on those facts casting them in their favor it would appear that this is a property which yields a reasonable profit to the debtor, and in the judgment of both the debtor and the receiver, that property might well be instrumental in the debtor's continued viability and its ability to come to a successful accord with its creditors by filing a plan and having the wherewithal to translate that plan into the order of confirmation which terminates these proceedings in Chapter XI and which sends the debtor forth rehabilitated.

I am not at this point prepared in the face of what appears to be no pre-petition default - - although technically there is a default in that the 1973 taxes were due but were not payable until after the proceedings were begun and after the receiver took over - -

I am not prepared to restore property to a landlord on those facts where the essence of such grant would be to give the landlord a windfall by him realizing the profits which the debtor has from the sub-tenants, in keeping with the subleases, and I put aside for the moment the question of whether or not the lease with West Cash & Carry will be or will not be rejected under the authority of Section 313(1) of the Bankruptcy Act wherein that individual or the company, if it wishes to stay in the premises, might have to negotiate a lease more in keeping with the going rate, as has been testified to by Mr. Flanagan.

I rely for that proposition and that proposition alone on the decision by District Judge Judd in the Eastern District of New York in the Queens Boulevard Liquor case which I understand was argued to the Court of Appeals for the Second Circuit, and I also understand was affirmed. But, at present, I rely on the decision of Judge Judd because there there was a default of at least a month and an immediate tender. Here I find no default and I think

it would be unconscionable for this Court in the exercise of its Chapter XI jurisdiction and the exercise of its equitable function, as recently reaffirmed by the Supreme Court in Bank of Marin against England, that basically we exercise equitable principles in the course of our jurisdiction, and it would seem to me to be imcomprehensible that Congress could have intended that the entire rehabilitative scheme of Chapter XI would be defeated by restoring property to a landlord where there has been no default and giving the landlord the benefit of all of the profits that the subleases yield to the debtor, and which the debtor needs in the exercise of its business, and in the expectation that profitable ventures such as this will play a part in an order confirming the plan. And, on the very limited and narrow facts presented in this dispute, I once more want to state I make no finding that the lease has been terminated on the bankruptcy petition. I make no finding that anything has affected the lease.

I simply follow the route suggested

by the last affirmative defense suggested in the answer, namely, this is a Court of Equity attesting within Congress' scheme to rehabilitate a debtor. I do not believe this landlord has been impeded, a word used by District Judge Brient in a decision affirming this Court's decision in the matter of Unishops, Inc., later affirmed on other grounds by the Court of Appeals for the Second Circuit in March of this year.

There Judge Brient opined the fact that firm clauses such as these should not be enforceable, particularly where the landlord has not, to use his words, been impeded.

I think the Court is bound by the decision in Finn against Meehan - - I think it's 325 U. S. or 300 U. S., it doesn't matter because we will get you the right citation. There the Supreme Court concluded that clauses such as these are, indeed, enforceable. Judge Judd agreed with that and, nonetheless, found in the exercise of an equitable jurisdiction there could be appropriate circumstances in which the Courts wouldn't enforce the termina-

tion of the debtor's estate in the property to return the property to a landlord for the purpose of that landlord achieving a substantial profit.

The Court goes no further than that and cites all parties concerned to the decision by the Third and Fourth Circuits referred to by Judge Judd in his decision in Queens Boulevard and, also, the remarks of Supreme Court Justice White, dissenting from the denial of certiorary in one of these and wondering about the continued vitality of Finn against Meehan.

The motion is in all respects denied. It is so ordered. For purposes of an appeal under Part 8 of the bankruptcy rules, Mr. Zimmerman, you may consider your time under Section 39C of the Bankruptcy Act to be running from now. I will merely make a memorandum endorsement on the papers that the motion is denied for the reasons set forth on the record. So ordered.

MR. ZIMMERMAN: May I request certain clarifications of your decision at this point?

THE REFEREE: Yes.

MR. ZIMMERMAN: Is it Your Honor's decision that he is not making any determination of the issue as to whether or not the lease is terminated on the basis of the default provision in the lease, but is only determining that the landlord's request for possession of the premises is denied on the basis of Lane Foods?

THE REFEREE: That is basically what I have done.

MR. ZIMMERMAN: Then, Your Honor, there is no finding of fact that there has not been a default under the lease.

THE REFEREE: I made no finding with respect to the lease. I stated in the record what I consider the facts to be. I do not and I don't think anyone should conclude these add up to a default as a matter of law. I do no more than express what the evidence showed as to defaults as of the time of the petition. I don't use the word "default" legally.

If you wish to appeal, Mr. Zimmerman, you may follow the procedure now set forth by

Part 8 of the bankruptcy rules. Your time begins from today under Section 39C.

MR. ZIMMERMAN: May I, in the presence of the Court, ask how soon I can have the transcript?

MR. RAYVID: Monday.

MR. ZIMMERMAN: May I ask that the applicant be given an additional twenty days to perfect his appeal?

THE REFEREE: I think I should have that in writing. I think the new rules contemplate an order. I feel much tidier working with an order, particularly since the Saint Regis paper in the Fifth Circuit. I think the outside reach I can give you is up to thirty d_, s.

MR. ZIMMERMAN: Up to thirty?

THE REFEREE: I will give you the maximum authorized by Rule 801.

MR. BOOTH: The receiver will consent.

THE REFEREE: That's nice of you, Mr. Booth, since I was going to do it anyway. Mr. Zimmerman, thank you, and Mr. Fixell, thank you.

MR. ZIMMERMAN: Would you like the exhibits?

THE REFEREE: I think if you are going to appeal, each party should be responsible for his own exhibits. Thank you, gentlemen.

- - - - -

STATE OF NEW YORK
COUNTY OF NEW YORK

BERT MYERS being duly sworn deposes and says: On November 1st, 1974 I served the within ~~record on appeal brief~~ appendix on Wachtell Lipton Rosen & Katz Appellee the attorneys for the ~~respondent~~ by leaving ~~mailing~~ ~~three~~ two copies thereof at his office located at 299 Park Avenue New York, N.Y.

Landlords of Boston 6 + 7c Miami 2

Bert Myers

Sworn to before me
this 1st day of
November, 1974
Theresa Corless

THERESA CORLESS
Notary Public, State of New York
No. 4518917
Qualified in Bronx County
Term Expires March 30, 1976

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COUNTY OF NEW YORK

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Landlords of Buffalo 2, Columbus 3, Denver 4, Miami 7

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Term Expires March 30, 1976

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this 1st day of
November, 1974

Theresa Corless

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Notary Public, State of New York
No. 4518917
Qualified in Bronx County
Term Expires March 30, 1976